CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1905.

No. [redacted] 21.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN UPON THE RELATION OF L. E. KIES ET AL., PLAINTIFFS IN ERROR,

vs.

THOMAS J. LOWREY, H. S. WALWORTH, C. H. MANZER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED MAY 9, 1904.

(19,330.)

(19,330.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 248.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN UPON THE RELATION OF L. E. KIES ET AL., PLAINTIFFS IN ERROR,

vs.

THOMAS J. LOWREY, H. S. WALWORTH, C. H. MANZER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

	Original.	Print.
Caption	a	1
Petition for writ of error	1	1
Exhibit A—Act to incorporate the public schools of the village of Jerome, &c	6	5
B—Information	11	8
C—Plea	13	10
D—Replication	16	12
E—Demurrer	24	16
F—Judgment	25	17
G—Bill of exceptions	26	18
H—Assignment of errors	30	20
I—Relator's brief	31	21
J—Respondents' brief	56	37
K—Opinion	67	43
Motion to advance	79	53
Order advancing cause	81	55

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1904.

	Original.	Print
Argument and submission	82	55
Order filing opinion	83	56
Order submitting motion for rehearing	84	56
Motion for rehearing	85	56
Objections to rehearing	89	59
Order denying rehearing	92	60
Judgment	93	61
Bond on writ of error	94	61
Citation and service	96	63
Assignment of errors	97	64
Writ of error	100	65
Clerk's certificate	102	67

a THE ATTORNEY GENERAL *ex Rel.* L. E. KIES ET AL., Plaintiff in Error,
vs.
THOMAS J. LOWREY ET AL., Defendants in Error.

Return to Writ of Error from Supreme Court of Michigan.

1 Petition for allowance of writ of error.

To the Hon. Joseph B. Moore, chief justice of the supreme court of the State of Michigan:

The petition of Charles A. Blair, attorney general of the State of Michigan, for a writ of error to be directed to the supreme court of the State of Michigan, to bring before the Supreme Court of the United States the case of Attorney General, relator, *vs.* Thomas J. Lowrey *et al.*, heretofore decided by the supreme court of the State of Michigan.

Your petitioner, Charles A. Blair, respectfully shows and represents as follows:

First. That he was elected to the office of attorney general, of the State of Michigan, at the general election held therein in November, 1902, and duly qualified and entered upon the discharge of his duties as such attorney general on the first day of January, 1903, and has ever since said first day of January, 1903, filled said office, and is still attorney general of the said State of Michigan.

Second. That his predecessor in office was the Hon. Horace M. Oren, who was elected to the office of attorney general of the State of Michigan at the general election held in said State in November, 1898, and again at the general election held in said State in the month of November, 1900. That the said Horace M. Oren entered upon the discharge of his duties as such attorney general for the State of Michigan on the first day of January, 1899, and continued to fill such office as attorney general for the State of Michigan from that time continuously until the first day of January, 1902.

Third. Your petitioner further shows that at a regular session of the legislature of the State of Michigan, held in the year of 1901, an act was passed entitled:—

"An act to incorporate the public schools of the village of Jerome, Hillsdale county, Michigan; define the boundaries thereof, provide for the election of trustees and fix their powers and duties, and provide for the distribution of the territory of the disorganized districts." said act being known as number 315 of the Local Acts of 1901, of the State of Michigan, a copy of which said act is hereto attached, marked "Exhibit A.," and made a part of this petition.

Fourth. Your petitioner further shows that said act was passed for the purpose of incorporating certain lands situate in the county of Hillsdale, specifically described in said act, into a school
2 district with its central school building in the village of Jerome, township of Somerset, county of Hillsdale, and State of Michigan, and that said act appointed and named the officers of said incorporated school district as, T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins, and Jay Chandler.

Fifth. And your petitioner further shows that in and by the terms of said act so passed as aforesaid the powers of said school district so incorporated as aforesaid were specifically defined and pointed out.

Sixth. Your petitioner further shows that the lands incorporated into and constituting the territory so incorporated by said act number 315, constituted and were a part of four school districts then and theretofore existing under and by virtue of, and which had been duly and legally incorporated under and by virtue of the general school laws of the State of Michigan, known as district number 3, and district nnmber 7 of the township of Somerset, and fractional school district number 8 of the townships of Somerset and Moscow, and fractional school district number 2 of the townships of Somerset and Moscow. That said school districts numbers 3 and 7 of the township of Somerset, and fractional districts numbers 2 and 8 of the townships of Somerset and Moscow, as such corporations, were the legal owners of lands, school houses, and school sites, together with fixtures, libraries, and property both real and personal, which had been acquired and was then and there owned and held as the private property of said school districts.

Seventh. And your petitioner further shows that under and by virtue of said act number 315, so passed as aforesaid, all of the property, lands, school houses, sites, together with the furniture, libraries, effects and estates, and all property, real and personal, of said districts were transferred to the new school district thus incorporated and without any provision for an equitable division of said property between the territory constituting said new school district and the territory of the said old school districts, not incorporated into said new school districts, and without any provision whatever for compensation for said property, or any part or parcel thereof, and without the leave or consent of the inhabitants or tax-payers of the said old school districts, or any one of them.

3 Eighth. And your petitioner further shows that after the passage of said act number 315 aforesaid and the taking effect of the same, the Hon. Horace M. Oren, then attorney general of the State of Michigan, for and in behalf of the people of the State of Michigan, and upon the relation of L. E. Kies, W. E. Alley, J. B. Strong, and Stephen McCleary, resident tax-payers, property owners, and voters in said old school districts, on the fourth day of October, 1901, commenced suit in the circuit court for the county of Hillsdale, by filing an information in the nature of a *quo warranto* against the said T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M.

Bross, W. L. Bibbins, and Jay Chandler, for the purpose of testing the constitutionality and validity of said act number 315, claiming that said act number 315 was unconstitutional and void, a copy of which information is hereto attached, marked "Exhibit B.," and made a part of this petition.

Ninth. Your petitioner further shows that afterwards and to-wit, on the twenty-fifth day of November, 1901, the said T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins, and Jay Chandler, filed their plea to said information in said circuit court for the county of Hillsdale, a copy of which is hereto attached, marked "Exhibit C.," and made a part of this petition. That on the seventh day of January, 1902, said Horace M. Oren, as attorney general, caused to be filed his replication to said plea, a copy of which is hereto attached and marked "Exhibit D.," and made a part of this petition. And on the eleventh day of March, 1902, the said Lowrey and others caused to be filed in said cause their demurrer to said replication, a copy of which demurrer is hereto attached, marked "Exhibit E.," and made a part of this petition. That by virtue of said filing of said plea, replication, and demurrer, issue was duly joined in said cause, putting in issue the constitutionality and validity of said act number 315.

Tenth. And your petitioner further shows that said cause was afterwards brought on for hearing before said circuit court for the county of Hillsdale, and on the twenty-eighth day of April, 1902, the Hon. Guy M. Chester circuit judge of said circuit court for the county of Hillsdale, decided said cause and held said act number
315 unconstitutional and void, and rendered judgment of
4 ouster against said defendants Lowrey and others, a copy of which said judgment is hereto attached, marked "Exhibit F.," and made a part of this petition.

Eleventh. And your petitioner further shows that afterwards said cause was taken to the supreme court of the State of Michigan by writ of error and bill of exceptions, a copy of which bill of exceptions is hereto attached, marked "Exhibit G.," and made a part of this petition, and a copy of the assignments of error attached to the said bill of exceptions is hereto attached, marked "Exhibit H.," and made a part of this petition.

Twelfth. And your petitioner further shows that upon the hearing of said cause in the supreme court of the State of Michigan, the said attorney general caused to be printed and filed in said court his written brief and argument, a copy of which relator's brief is hereto attached, marked "Exhibit I.," and made a part of this petition. And the said defendants Lowrey and others, by their said attorneys, caused to be printed and filed in the said supreme court of the State of Michigan, their printed argument and brief, a copy of which said argument and brief is hereto attached, marked "Exhibit J.," and made a part of this petition.

Thirteenth. And your petitioner further shows that said cause came on to be heard before said supreme court of the State of Michigan, and was decided by said court on the eighteenth day of No-

vember, 1902, and an opinion was written and filed therein by the Hon. Frank A. Hooker, chief justice of the supreme court of the State of Michigan, and an opinion was also filed therein by the Hon. C. B. Grant, one of the associate justices of said court, a copy of which opinions is hereto attached, marked "Exhibit K.," and made a part of this petition.

Fourteenth. And your petitioner further shows that by the decision of the supreme court of the State of Michigan, the validity and constitutionality of said act number 315 was sustained, the decision of the circuit court for the county of Hillsdale reversed, and said act was declared to be constitutional and valid in all respects.

Fifteenth. And your petitioner further shows that in the proceedings in said case in the said circuit court for the county of Hillsdale, and in the supreme court of the State of Michigan, the following Federal questions were involved and presented therein and determined by the courts, viz:—

a. The validity of said statute of the State of Michigan was challenged as depriving the school district or municipality, organized by said act number 315, of the right of local self government, guaranteed to a municipality by the constitution.

b. That the act as passed impairs the obligation of contracts within the meaning of the Constitution of the United States and the constitution of the State of Michigan.

c. That it takes away from the old school districts the property of said school districts without the consent of said districts or of the inhabitants, tax-payers, or voters thereof, without just compensation, and without due process of law.

Sixteenth. And your petitioner further shows that a final judgment has been entered in the supreme court of the State of Michigan, the highest court of said State, in said suit, and in said suit was drawn a question, the validity of a statute of the State of Michigan, on the ground of its being repugnant and contrary to the Constitution of the United States, and the decision of said supreme court of the State of Michigan is in favor of the validity of said act or statute.

Your petitioner therefore prays that a writ of error may be granted and allowed, the same to be sued out of the Supreme Court of the United States of America, directed to the supreme court of the State of Michigan, for the review of said decision of the supreme court of the State of Michigan, and that said decision may be reexamined, reviewed, and reversed by the Supreme Court of the United States, upon said writ of error. That said writ of error is prayed and asked for under and by virtue of the Revised Statutes of the United States, section 709, etc.

And your petitioner will ever pray, etc.

CHAS. A. BLAIR,
Attorney General.

F. A. LYON,
Attorney for Relator.

Business address: Hillsdale Mich.

6 "EXHIBIT A."

(No. 315.)

An act to incorporate the public schools of the village of Jerome, Hillsdale county, Michigan; define the boundaries thereof, provide for the election of trustees and fix their powers and duties, and provide for the distribution of the territory of the disorganized districts.

The people of the State of Michigan enact:

SECTION 1. That so much of the township of Somerset in the county of Hillsdale and the township of Moscow in the county of Hillsdale as are included in the following descriptions and boundaries, viz: all those lands situate in town five south of range one west, known and described as sections seventeen, eighteen, nineteen, twenty and thirty, and the west half of section eight, and section seven excepting the west half of the northwest quarter thereof, and the north half of section thirty-one excepting the south half of the east half of the northeast quarter thereof, and the north half of section thirty-two excepting the south half of the west half of the northwest quarter thereof, and the west half and the south half of the southeast quarter and the northwest quarter of the northwest quarter all on section twenty-nine, and the northwest quarter of section twenty-one, and the west half of the west half and the southeast quarter of the southwest quarter of section sixteen, and all those lands situate in town five south of range two west, described as the east half of the southeast quarter of section thirteen, and all of section twenty-four excepting the west half of the west half thereof, and all of section twenty-five excepting the west half of the west half thereof, and the northeast quarter of the northeast quarter of section thirty-six, shall constitute a single school district to be known and designated as the public schools of the village of Jerome, and such school district shall have all the powers and privileges conferred upon school districts, and union and graded school districts, by general law, and hereafter all schools established therein, in pursuance of this act, under the direction and regulation of the school board shall be public and free to all children actual
7 residents within the limits thereof.

SEC. 2. The officers of said district shall consist of Trustees T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins, of the school district heretofore known as fractional school district number two of the townships Somerset and Moscow, and Jay Chandler of the school district heretofore known as district number seven of the township of Somerset, whose powers and duties shall be severally the same as those conferred upon and required of the moderator, director, and assessor of school districts in this

State, except so far as the same are varied or modified by the provisions of this act, or other acts relating to said district, who shall be and are hereby constituted the trustees and officers of the public schools of the village of Jerome; whose term of office shall continue until their successors shall be elected and qualified as hereinafter provided. Said board shall within twenty days after this act shall take effect meet and by lot divide into three equal divisions the terms of office of which shall expire as follows: The first division at the time of the first annual school meeting held under the provisions of this act; the second division, at the time of the second annual meeting; and the third division, at the time of the third annual meeting; and at the same meeting of the board they shall elect from their own number a president, secretary and treasurer, whose terms of office shall continue until the next annual meeting of said district. Said board of trustees shall have power to fill all vacancies that may occur in their number, or in the officers appointed by them, until the next annual meeting of said district.

SEC. 3. At the annual meeting on the first day of July in each year there shall be elected by ballot two trustees whose term of office shall be three years, or until their successors are elected and qualified; and within ten days after each annual meeting the trustees shall meet and elect from their own number a president, secretary and treasurer for the ensuing year.

SEC. 4. From and after the passage of this act said board of trustees shall have all the powers and privileges conferred upon union and graded school districts by general law, and all
8 the powers and duties of school inspectors of townships in this State shall be vested in and required of said board of trustees, who shall be *ex officio* the board of school inspectors of the public schools of the village of Jerome and shall make their annual reports to the superintendent of public instruction as other boards of school inspectors are required to do under the general school laws.

SEC. 5. Said board of trustees shall hire and contract with such duly qualified teachers as may be required in the schools, and shall provide all necessary appendages for the school house, to keep the same in good condition and repair, and shall keep an accurate account of all expenses incurred by them and all claims for such expenses shall be audited by said board of trustees and paid by the treasurer out of any money provided by the district for that purpose, on the order of the secretary, countersigned by the president of the board. Said board shall present at each annual meeting of the district a statement of all receipts, expenditures, and accounts audited and allowed by them, together with the amount of the expenses necessary to be incurred during the ensuing year for such purposes and to pay the debts of the district and for the services of any teacher or any district officer, and such money when voted by any annual meeting shall be assessed and collected in the same manner as other district taxes but no tax for these purposes shall

be voted at a special meeting, unless a notice of the same shall be expressed in the notice of such meeting.

SEC. 6. The treasurer of said district within ten days after his election and before he enters upon the duties of his office, shall give a bond to said district in such sum and with such sureties as shall be approved by the district board conditioned for the faithful discharge of the duties of said office and to account for and pay over all moneys that shall come into his hands by virtue of said office, and he shall have power by suit at law, under the direction of the district board and in the name of the public schools of the village of Jerome, to collect all moneys due said district, or said public schools, from the several township treasurers, or for the tuition
9 of children who are not actual residents of said district, or that may be due said district from any other source whatever. The bond of said treasurer shall be filed with the secretary of the board of trustees.

SEC. 7. All the lands, school houses and sites, together with the furniture, libraries, property, effects and estates and all property real or personal of the districts formerly known as district number three, district number seven of the township of Somerset and fractional district number eight of the townships of Somerset and Moscow are hereby transferred to and declared the property of the public schools of the village of Jerome and it is expressly provided that all amounts due the said districts formerly known as district number three and district number seven of the township of Somerset and fractional district number eight of the townships of Somerset and Moscow from whatever source shall become due and payable to the public schools of the village of Jerome; and it is further provided that all debts and obligations against the school district formerly known as district number three and district number seven of the township of Somerset and fractional district number eight of the townships of Somerset and Moscow contracted before the passage of this act shall become the debts and obligations of the public schools of the village of Jerome and shall be paid by the board of trustees of the public schools of the village of Jerome upon proper proof of the validity of such debt or obligation.

SEC. 8. Suits may be brought by or against the public schools of the village of Jerome on all contracts, obligations, debts, bonds or demands due or unpaid from or to said fractional school district number two of the townships of Somerset and Moscow in like manner as they might have been by or against said school district if this act had not been passed.

SEC. 9. The site located heretofore and now held by said fractional school district number two aforesaid shall be and the same is hereby declared and deemed to be a school house site for the public schools of the village of Jerome and the school building now owned and occupied by said fractional school district number two aforesaid is hereby made and declared to be the central school building of the public schools of the village of Jerome, to be used for the academic

and more advanced classes of scholars and such other classes of scholars as the board of trustees shall deem necessary.

10 SEC. 10. The board of trustees of the public schools of the village of Jerome, as constituted in section two of this act, shall have power to sell at private or public sale the school buildings and sites owned by districts formerly known as district number three and district number seven of the township of Somerset and fractional district number eight of the townships — Somerset and Moscow, and the moneys received from such sale of said buildings and real estate may be used by said board of the public schools of the village of Jerome to make such repairs, improvements and additions to the central school building as they may deem necessary.

SEC. 11. Within thirty days after this act shall take effecr the board of school inspectors of said township of Somerset shall meet and attach to other districts in whole or in part within the boundaries of said township, such parts of said districts formerly known as district number three and district number seven of the township of Somerset and fractional district number eight of the townships of Somerset and Moscow as are not by this act included within the boundaries of said public schools of the village of Jerome: Provided, that the said board of trustees of the public schools of the village of Jerome shall fulfil all contracts now existing in any of the districts affected by the provisions of this act.

This act is ordered to take immediate effect.

Approved March 1, 1901.

11 EXHIBIT B.

Information.

STATE OF MICHIGAN:

The Circuit Court for the County of Hillsdale.

COUNTY OF HILLSDALE, *ss:*

Horace M. Oren, attorney general of the State of Michigan, who sues for and on behalf of the people of the State of Michigan in this case, comes here into the said circuit court for the county of Hillsdale, on this 4th day of October, 1901, and upon the relation of L. E. Kies, W. E. Alley, J. B. Strong and Stephen McClearly, according to the form of the statute in such case made and provided, and gives the court now here to understand and be informed that T. J. Lowery, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler, of the county of Hillsdale, and in the State of Michigan, since the first day of March A. D. 1901, have held, usurped and intruded into, and claim to exercise a false, fictitious and pretended public office, to-wit: trustees and officers of the pretended school dis-

trict known as "The public schools of the village of Jerome," and *ex-officio* "The board of school inspectors of the public schools of the village of Jerome," and claim to have and exercise all the powers, rights and duties of a board of trustees or officers of said pretended school district, known and designated as "The public schools of the village of Jerome," and claim to have and exercise all the powers and duties of school inspectors of townships in this State, and *ex-officio* a board of school inspectors of the public school of the village of Jerome,
and required to make annual reports to the superintendent
12 of public instruction, as other boards of school inspectors are required to do, under the general school laws, and all without any legal election, appointment, warrant or authority whatsoever; and since said first day of March, A. D. 1901, the said T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler have usurped into and claim to exercise, and still do usurp, intrude into and unlawfully claim to hold and exercise said false, fictitious and pretended office known as the office of trustees (or officers) of the pretended and illegal so-called school district known as "The public schools of the village of Jerome," and *ex-officio* "The board of school inspectors of the public schools of the village of Jerome," to wit: at the county of Hillsdale aforesaid, in contempt of the people of the State of Michigan, and to their great damage and prejudice.

Wherefore, the said attorney general prays the advice of the court in the premises, and for due process of law against the said T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler, in this behalf, to be made to answer to the said people by what warrant they, the said T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler, claim to hold, use, exercise and enjoy the said office of trustees (or officers) of the public schools of the village of Jerome, and *ex-officio* a board of school inspectors of the public schools of the village of Jerome.

HORACE M. OREN,
Attorney General of the State of Michigan.

LYON & McINTYRE,
Of Counsel for Relators.

Filed Oct. 7, 1901.

PAUL W. CHASE,
Deputy Clerk.

13 EXHIBIT "C."

Plea.

STATE OF MICHIGAN:

The Circuit Court for the County of Hillsdale.

THE PEOPLE *ex. Rel.* HORACE M. OREN, Attorney General, Plaintiff,
vs.
T. J. LOWERY, H. S. WALWORTH, C. H. MANZER, C. M. BROSS, W. L. Bibbins, and Jay Chandler, Defendants.

And to-wit, on the 25th day of November, 1901, before said court in Hillsdale, comes the said defendants and each of them, by F. H. Stone and W. J. Sampson, their attorneys, and having heard read the information in this case against them for plea in this behalf say:

First. These defendants each admit that they have since the said first day of March, 1901, held and claimed to exercise the right of public officers, to-wit: trustees and officers of the school district known as "The public schools of the village of Jerome" and *ex-officio*, "The board of school inspectors of the public schools

14 of the village of Jerome." These defendants further admit that they claim to have and exercise all the powers, rights and duties of a board of trustees or officers of the school district known and designated as "Public schools of the village of Jerome" and claim to have and exercise all the powers and duties of school inspectors of townships in this State and *ex-officio* a board of school inspectors of the public schools of the village of Jerome and required to make annual reports to the superintendent of public instruction as other boards of school inspectors are required to do, as set forth in the information in this case against them. But these defendants expressly deny that they have usurped and intruded into such public offices and expressly deny that such public offices are false, fictitious and pretended, as set forth in said information; expressly denying that said school district is a pretended school district as set forth in said information; expressly deny that their acts and conduct in the premises and their occupation of said public offices are without any legal election, appointment, warrant or authority whatsoever, as set forth in said information, and expressly denying each and every allegation in said information contained wherein these defendants, or any one of them, is charged with usurping, intruding into or unlawfully claiming to hold and exercise any office in connection with the so-called school district known as "The public schools of the village of Jerome" and *ex-officio* "The board of school inspectors of the public schools of the village of Jerome" and expressly deny that they are in contempt of the people of the State of

Michigan and expressly denying that they or any of them
15 have done anything in the premises to the damage and prejudice of said people as set forth in said information.

Second. And these defendants, for a further plea to the information filed in this cause, respectfully show that on, to-wit, the first day of March, 1901, the legislature of this State duly and lawfully passed an act known as "Act No. 315, Local Acts of 1901," entitled "An act to incorporate the public schools of the village of Jerome, Hillsdale county, Michigan, define the boundaries thereof, provide for the election of trustees and fix their powers and duties and provide for the distribution of the territory of the disorganized district," therein and thereby creating and constituting a single school district to be known and designated as the public schools of the village of Jerome; that under and by virtue of such act of the legislature these defendants and each of them became officers of said school district and ever since the passage and taking effect of said act of the legislature have continued to hold such offices and perform the duties thereof in strict accordance with the provisions of such act of the legislature and in no other manner; that such act was duly and regularly signed and approved by the governor of this State on, to-wit, March 1, 1901, went into immediate effect and is now and has been ever since said first day of March, 1901, of full force and effect. All of which matters these defendants are ready to verify and prove as the court shall award.

Wherefore they pray judgment, and that the said offices, &c., by these defendants claimed in manner aforesaid, may be allowed and adjudged to them, and that they may be dismissed and discharged by the court hereof and from the premises above charged upon them.

T. J. LOWREY,
H. S. WALWORTH,
C. H. MANZER,
C. M. BROSS,
W. L. BIBBINS,
JAY CHANDLER, *Def'ts*,
By F. H. STONE, *Attorney*.

F. H. STONE,
W. J. SAMPSON,
Attorneys for Defendants.

Filed Nov. 25th, 1901.
FRANK L. MASTERS, *Clerk*.

16 EXHIBIT "D."

Replication.

STATE OF MICHIGAN:

The Circuit Court for the County of Hillsdale.

THE PEOPLE *ex Rel.* HORACE M. OREN, Attorney General,
vs.
T. J. LOWREY, H. S. WALWORTH, C. H. MANZER, C. M. BROSS, W. L. Bibbins, and Jay Chandler, Respondents.

The replication of the above named relator to the answer of the above named respondents in the above entitled cause.

This relator for replication to the said answer of the above named respondent, says:

I.

The act of the legislature of the State of Michigan, under which the said respondents seek to justify their actions in this cause, viz: local act, No. 315, of 1901, is unconstitutional and void, and confers upon said pretended school district, attempted to be created thereby, and its said pretended officers and pretended board of trustees, no authority to act in the premises.

II.

There are many of the provisions of said act that are not within but are outside of the title to said act.

17 III.

Said act attempts to create a school district out of certain territory therein specified, and to confer upon said pretended school district certain enumerated powers, and at the same time attempts to keep said pretended school district within the provisions of, and under the provisions of, the general laws of the State of Michigan relative to primary and graded schools, which cannot constitutionally be done.

IV.

Section one of said act provides that the territory therein desig nated "shall constitute a single school district, to be known and designated as the public schools of the village of Jerome, and such school district shall have all the powers and privileges conferred upon school districts and union and graded school districts, by

general law." This provision attempts, at once, to create a school district under and by a special charter, and to make it also subject to the provisions of the general laws of the State relative to primary and graded schools, which said relator submits can not be done under the constitution.

V.

Section two of said act names the above named respondents as the officers of said pretended district, and fixes the term of office of said trustees and officers for definite periods, to-wit: one-third thereof to continue until the first annual school meeting of said district, one-third thereof to continue until the second annual school meeting of said district, and the other one-third thereof to continue until the third annual school meeting of said district, thus
18 depriving said district of the right of local self-government. This, the said relator submits, cannot be lawfully done, under the provisions of the constitution of the State of Michigan.

VI.

Said section two of said act provides for the determining by lot as to what trustees shall serve for the respective terms, that is, the respective terms of office of said trustees are to be determined by lot, and the tax-payers and electors of said district have nothing to say as to this matter, thus further depriving said district of the right of local self-government, which is a constitutional right of all municipalities in the State of Michigan, and cannot be taken away by legislative enactment.

VII.

Said section two, as well as section five, attempts to confer upon said officers and trustees all the powers and duties conferred upon and required of school officers and trustees under the general laws of the State relative to primary and graded schools, while providing a special charter for said district.

VIII.

Said section two provides for the meeting within twenty days after said act shall take effect, and for dividing their number, by lot. into divisions, and that the terms of office of said designated trustees shall thereupon become fixed for certain definite terms. This, the relator submits, is unconstitutional in that it deprives this district of the rights of local self-government, which is guaranteed under the constitution of this State.

19 IX.

Said act not only appoints said trustees, by naming them in the act, and fixes their terms of office definitely, but provided for filling

of all vacancies for a definite term by these designated trustees and their officers, thus further depriving the inhabitants of said district of the right of local self-government.

X.

Section four of said act provides: "Said board of trustees shall have all the powers and privileges conferred upon union and graded school districts by general law," and "All the powers and duties of school inspectors of townships in this State shall be vested in and required of said board of trustees." Thus and there by attempting to create a separate district, with a fixed and definite territory, which can only be changed by legislative enactment, and yet making it subject to the general laws of the State relative to primary and graded school districts, which cannot lawfully be done under the constitution of the State. And also thus and thereby appointing by legislative enactment a board of school inspectors, with all the powers and duties of school inspectors of townships, which is entirely outside of the title of said act, and which again deprives the inhabitants of local self-government, and is therefore unconstitutional and void.

XI.

Section five of said act provides for paying said trustees a salary.

XII.

Section seven of said act attempts to transfer to said district "All the lands, school houses and sites, together with the furniture, libraries, property, effects and estates, and all property, real or personal, of the districts formerly known as district number three, district number seven of the township of Somerset, and fractional district number eight of the townships of Somerset and Moscow." And this notwithstanding the fact that a very large amount of territory of said former districts has been left out of said pretended new district, and said act in no way preserves, or attempts to preserve, to the territory so left out of said new district, a just and equitable share of the property of said old districts. Thus and thereby depriving the inhabitants so left out of said new district of their property, without due process of law, and without their consent. And said provision is also contrary to the provisions of the general law of the State relative to organization of school districts, or the changing of the boundaries of school districts, or the creating of new school districts by consolidation, and is contrary to the provisions of the general law of the State relative to the disposal of the property of school districts.

XIII.

Section nine of said act fixes, by legislative enactment, the school house site for the central school building, and thereby deprives the

inhabitants and taxpayers of said district of the right to determine the question themselves, thus again depriving them of the right of local self-government. This is also inconsistent with the provisions of the general school law of the State of Michigan, relative to
21 the fixing of the school house sites of districts governed by the provisions of such general school laws.

XIV.

Section ten of said act confers upon the trustees named by legislative enactment the right to confiscate the property of the old school districts number three and number seven of the township of Somerset and fractional district number eight of Moscow, to dispose of the same at public or private sale, and then use the same in the new district without let or hindrance of the inhabitants of such districts and without preserving to the inhabitants of such old districts, who are left out of said new district, their just and equitable share thereof, and without giving the inhabitants and voters of said districts or of said new district any voice regarding the matter, thus depriving them of local self government.

XV.

Said section ten provides by legislative enactment what shall be done with the proceeds of the sale of real-estate belonging to the said old districts.

XVI.

Section eleven of said act provides for the disposition of the territory of the old districts which have been left out of the new district and permits it to be attached to districts either within or without said township in which it is situated, and this by the township board of school inspectors of the township of Somerset alone, thus and thereby violating the entire policy of the laws of the State of Michigan in force upon that subject, and depriving the
22 inhabitants, tax-payers and voters of said districts and territory of all right of local self government regarding the same.

XVII.

Said act is unconstitutional and void in that it attempts to take away from school districts three and seven of the township of Somerset and fractional school districts of the township of Somerset and Moscow, the property of said districts without the consent of said districts, or of the inhabitants, taxpayers or voters thereof, and without just compensation and without due process of law.

XVIII.

Said act is unconstitutional and void because it deprives the inhabitants, tax-payers and voters of the territory constituting said

old districts, as well as said new districts, of the right of local self-government.

XIX.

Said act is unconstitutional and void for the reason that it appoints, by legislative enactment, officers for said pretended district for definite terms, and gives them powers that can only be delegated by the legal voters of said district.

XX.

Said act is unconstitutional and void for the reason that it attempts to create the double office of school trustee and school inspector, and define the powers and duties of such officers, without the same being within the title of said act.

XXI.

Said act is unconstitutional and void because the same
23 violates the constitutional provision of the State of Michigan relative to primary schools.

XXII.

Said act is unconstitutional and void in that it violates the letter and spirit of the constitution of the State of Michigan, and is beyond the legislative powers conferred by said constitution, and is inequitable and unjust in its provisions.

All of which is respectfully submitted.

LYON & McINTYRE,
Attorneys for Relator.

Filed, Jan'y 7, 1902.
FRANK L. MASTERS, *Clerk.*

24 EXHIBIT "E."

Demurrer.

STATE OF MICHIGAN:

The Circuit Court for the County of Hillsdale.

THE PEOPLE *ex Rel.* HORACE M. OREN, Attorney General, Relator,
vs.
T. J. LOWREY, H. S. WALWORTH, C. H. MANZER, C. M. BROSS, W. L. Bibbins, and Jay Chandler, Respondents.

And now come the said respondents and say; that the replication of the said relator is not sufficient in law, and as a ground of demurrer say that the said replication does not set forth, in any of its

paragraphs therein contained, any ground or reason why the said respondents are not the legally appointed "Board of trustees or officers of the school district known and designated as public schools of the village of Jerome," and *ex-officio* "The board of school inspectors of the public schools of the village of Jerome" and does not set forth any reason why the said respondents and each of them should not hold, use, occupy and enjoy the right of said public officers, to-wit, a "Board of trustees or officers of the school district known and designated as "The public schools of the village of Jerome," and *ex-officio* "The board of school inspectors of the public schools of the village of Jerome." And said respondents further say that the said relator, by the said replication, offers to put in issue matters not properly issuable and immaterial.

F. H. STONE,
W. J. SAMPSON,
Attorneys for Respondents.

I, Fred H. Stone, do hereby certify that I am the attorney having the principal charge of the case on behalf of the respondents, and that the above demurrer is not interposed for delay, and that in my opinion it is well founded.

F. H STONE.

Filed, March 11th, 1902.

FRANK L. MASTERS, *Clerk.*

25 EXHIBIT "F."

Judgment.

At a general session of the circuit court for the county of Hillsdale, convened and held in the court house, in the city of Hillsdale, on Monday, the 28th day of April, A. D. 1902.

Present: The Hon. Guy M. Chester, circuit judge.

THE PEOPLE *ex Rel.* HORACE M. OREN, Attorney General, Plaintiff,
vs.
T. J. LOWREY, H. S. WALWORTH, C. H. MANZER, C. M. BROSS, W. L. Bibbins, and Jay Chandler, Defendants.

This cause having come on for hearing, upon the information of said attorney general, the plea of said respondents, the replication of said relator to said respondents' plea, and the demurrer of said respondents to said relator's plea; after listening to Lyon & McIntyre, attorneys for relator, and F. H. Stone and W. J. Sampson for respondents, and the court, being fully advised in the premises, does find that the statute under which said respondents seek to justify

their actions and claim to act, namely, act No. 315, of the Local Acts of the State of Michigan, for the Year 1901, is unconstitutional and void, and that they have, since the first day of March, 1901, held, usurped and intruded into and claimed to exercise the false, fictitious and pretended public office of trustees and officers of the pretended school district known as "The public schools of the village of Jerome," and *ex-officio* "The board of school inspectors of the public schools of the village of Jerome," as alleged in said relator's information.

It is, therefore, hereby adjudged that the said respondents be, and they are hereby, ousted of and from said pretended, false and fictitious public office as aforesaid, as prayed by said relator.

GUY M. CHESTER,
Circuit Judge.

26 EXHIBIT "G."

Bill of Exceptions.

The Circuit Court for the County of Hillsdale.

ATTORNEY GENERAL *ex. Rel.* L. E. KIES ET AL., Relators,
vs.
THOMAS J. LOWERY ET AL., Respondents.

At a session of said court held at the court house in the city of Hillsdale, in said county, on the 11th day of March, 1902, before the Honorable Guy M. Chester, judge of said court, the issue joined in the above entitled cause came on to be tried by said court without a jury, at which time came there the said parties to said cause by their respective attorneys. And thereupon the following proceedings were had in said cause:

Mr. SAMPSON: "Our examination of the practice has left some doubt in our minds as to whether or not it is necessary that we file a rejoinder to the replication of the relators. We are in doubt, and for that reason we ask leave to file one now. It is simply a formal demurrer and Mr. Lyon has had a copy of it. It is very questionable with us whether it is at all necessary to make up the pleadings."

27 Mr. LYON: "Well, so far as that is concerned, if the counsel wishes to file a demurrer we will not object. I don't think it is necessary."

The COURT: "Being in doubt you wish to file it?"

Mr. SAMPSON: "Yes, sir. I don't understand there is to be any testimony."

Mr. LYON: "We wish to put in some testimony as to the territory contained within the limits of the old districts which is left out of the new. The trouble is that the old records don't show the exact territory contained in the old districts. They have not got the

records that the law provides they shall have. If they had, all we would have to do would be to put in the records."

Mr. STONE: "We stand ready to verify our plea here, though we have not done so."

Mr. LYON: "Well, we raise no question on that."

After consultation the following stipulation was read into the record.

"For the purposes of this case, and without prejudicing the rights of either party, it is agreed that in the formation of the new district, which is the subject matter of this suit, the following lands, which were, prior to the formation of said new district, included in district No. 3, of Somerset, district No. 7, of Somerset, and district No. 8 fractional, of Somerset and Moscow, were not included in the new district: The west half of the north-east quarter, section 36, town of Moscow, and the south-east quarter of the north-east quarter of said section 36, formerly included in district No. 8 fractional; the west half
of the south-east quarter, section 5, township of Somerset, the
28 west half of the north-west quarter, section 7, township of Somerset, and the east half of section 8, township of Somerset, were formerly included in district No. 3. The south-east quarter, section 16, the northeast quarter of the south-west quarter, section 16, the east half of the north-west quarter, section 16, and the south-west quarter, section 21, all in the township of Somerset, were formerly included in district No. 7. The north-west quarter of the south-east quarter, section 29, the west half of the north-east quarter, section 29, the south-west quarter of the south-west quarter, section 28, the west 9-16 of the north-west quarter, section 33, the south-west quarter of the north-west quarter, section 32, and the south-east quarter of the north-east quarter, section 31, all in the township of Somerset, were formerly included in district No. 8, fractional."

Mr. SAMPSON: "What we are anxious to have is that this case be so heard that either party may have a complete and full record. We justify under the special act creating this district, being act No. 315, Local Acts of 1901. We are prepared to prove, if called upon, that since the passage of this act we have carried out its provisions, but as we understand it, that question is not in the case."

Mr. LYON: "That is not in the case."

Mr. SAMPSON: "Is it agreed that the only question for litigation here is the constitutionality of the act which purports to create this district?"

Mr. LYON: "That is the only question I know of which is in this case."

29 Thereupon the case was argued by counsel for the respective parties and taken for consideration by the court, and at a session of said court, held at the court house, in the city of Hillsdale, on the 21st day of April, 1902, the said court made his findings in said cause and rendered his decision therein, in open court, as follows:

"GENTLEMEN: In this matter of the Attorney General *vs.* The School District down here at Jerome, I am quite persuaded in this case that this act is unconstitutional. With this view I think that the judgment of ouster should be entered."

To which finding and decision of the trial judge respondents, by their attorneys, duly excepted.

The foregoing is all of the testimony offered, and all the proceedings had upon the trial of said cause; and because none of the exceptions so made to the findings and decision of the circuit judge appear upon the record of said trial, therefore, on the prayer of said respondents, by their counsel, the circuit judge has signed this bill of exceptions, according to the statute in such case made and provided, this 7th day of May, A. D. 1902.

GUY M. CHESTER,
Circuit Judge.

30 EXHIBIT "H."

STATE OF MICHIGAN:

The Supreme Court.

ATTORNEY GENERAL *ex Rel.* L. E. KIES ET. AL., Relators and Appellees,
vs.
THOMAS J. LOWREY ET. AL., Respondents and Appellants.

Assignments of Error.

And now comes the above named respondents and appellants, by F. H. Stone and W. J. Sampson, their attorneys, and say that in the record, trial and proceeding had in said cause, in the court below, there is manifest error in this, viz:

First. The court erred in holding said act No. 315, Local Acts of 1901, unconstitutional.

Second. The court erred in not holding said act constitutional and valid.

Third. The court erred in directing judgment of ouster against respondents.

Therefore, for the errors aforesaid, the respondents pray that the judgment rendered in said cause in the circuit court for the county of Hillsdale may be set aside, reversed and held for naught.

F. H. STONE AND
W. J. SAMPSON,
Attorneys for Appellants.

The cause was brought to the supreme court by writ of error, issued May 8, 1902—the return to the writ being filed in the supreme court May 12, 1902.

31 EXHIBIT I.

STATE OF MICHIGAN:

The Supreme Court.

THE ATTORNEY GENERAL, Relator,
vs.
T. J. LOWREY ET AL., Respondents.

Relator's Brief.

The only question in this case is the constitutionality and validity of act No. 315 of the Local Acts of 1901, entitled "An act to incorporate the public schools of the village of Jerome, Hillsdale county, Michigan; define the boundaries thereof; provide for the election of trustees and fix their powers and duties; and provide for the distribution of the territory of the disorganized districts."

The respondents having demurred to the replication of the relator, they have admitted the truth of the allegations contained in such replication and are therefore estopped to further contest the matter.

32 In the replication filed by the relator he has distinctly denied the constitutionality of the act under which respondents seek to justify and instead of joining issue upon the constitutionality of this act the respondents concede its unconstitutionality, but contend that, notwithstanding the unconstitutionality of the act, they are still entitled to hold the offices in question. This we say is the effect of their demurrer. To our minds the very statement of the proposition suggests its own answer. If the act under which they claim to hold is unconstitutional, then it is void and is no law at all. The offices which the respondents claim to hold were created by this act or they do not exist at all. If the act is unconstitutional and void, then certainly the offices attempted to be created by this void act have no existence in fact and the respondents are usurpers when they attempt to perform any of the functions which would appertain to those offices if they had an actual existence.

We shall however attempt to point out to the court the reasons why the relator claims that this act is unconstitutional and void. We contend that the act is unconstitutional and void for the following reasons, to wit:

First. It deprives this school district or municipality of the right of local self-government, guaranteed to all municipalities by the constitution.

Second. The title to the act indicates and the act itself embraces more than one object.

Third. The act is broader than the title, the body of the act embraces many objects not covered by the title.

Fourth. The act as passed impairs the obligation of contracts, within the meaning of the Constitution of the United States and the constitution of the State of Michigan.

Argument and Authorities.

I.

We contend that this act deprives this school district of the right of local self government for the following reasons:

(*a.*) The act names and appoints for definite terms (not
33 provisionally) the officers of this municipality.

(*b.*) It fixes definitely the site of the central school building for said district and the uses to be made of said building, and does not allow the resident tax-payers and voters any voice in the matter.

(*c.*) It gives arbitrary power to a board appointed by legislative enactment, (and to no other) to confiscate the property of the old districts and fixes definitely what is to be done with this property, thus depriving the resident tax-payers and voters of all voice in the matter.

(*d.*) It fixes definitely what shall be done with the property of the old districts, and the uses to which it shall be put, and leaves absolutely no discretion in the local authorities nor in the trustees of said district.

(*e.*) It fixes definitely what shall be done with the territory of the old districts, not included in the new district, and appoints by legislative enactment the officers that are to make the disposition of this territory.

(*f.*) It appoints by legislative enactment a board of school inspectors for this district, which are constitutional officers, and deprives the local tax-payers and voters of all voice in the matter.

The State has the right, through its legislature, to mold and fashion the policy of its institutions, create or destroy municipalities, grant them charters, modify, amend, or repeal those charters, define their powers, restrict their powers, or take them away, but the right of local self-government by these municipalities and local institutions is an absolute right which the State cannot take away. This is a right which preceded the adoption of the constitution and is recognized by that instrument.

Mechem on Public Officers, sec. 123.
People *vs.* Hurlbut, 24 Mich., 44.
Attorney General *vs.* Detroit, 29 Mich., 110.
People *vs.* Detroit, 28 Mich., 228.
34 Attorney General *vs.* Detroit, 58 Mich., 213.
Moreland *vs.* Millen, 126 Mich., 381.
State *vs.* Denny, 118 Ind., 449.
Evansville *vs.* State, 118 Ind., 426.
Cooley on Constitutional Limitations, 5th edition, 45, 209, 225, 228.

This right of local self government is not confined to the choice of the officers which manage the local concerns of municipalities. It extends to the management of all the local concerns of these institutions. The management of the property of these corporations is as much a matter of local concern as is the choice of their officers.

Section two of this act names the respondents as the board of trustees of said district, they to hold office "until their successors shall be elected and qualified *as hereinafter provided.*"

Said section also provides that within twenty days after the act shall take effect said trustees shall meet" and *by lot divide* into three equal divisions, *the terms of office of which* shall expire as follows: The first division at the time of the first annual school meeting; the second division at the time of the second annual meeting; and the third division at the time of the third annual meeting; and at the same meeting they shall elect from their own number a president, secretary and treasurer, whose terms of office shall continue until the next annual meeting of said district. Said board of trustees shall have power to fill all vacancies that may occur in their number, or in the officers appointed by them, until the next annual meeting of said district.

The effect of this provision is to entirely deprive the local taxpayers and voters of all voice in the choice of these officers. Ordinarily when the legislature by special act creates a new municipality there is no question of the right and power of such legislature to appoint provisional officers to organize the corporation and set the machinery to going. But in this case such appointments are not and do not purport to be provisional, but permanent appointments. The terms of office are to run for one, two and three years, without any way of depriving these officers of their positions until the expiration of the full terms for which they were appointed.

In Counsel Graves' brief he frankly admits that:

"If school district officers are local municipal officers, pure and simple, there is no doubt that that portion of section two of the act which extends the term of the first board of trustees beyond the first annual election is unconstitutional and void." Page 22.

He, however, contends that school districts are not really local municipal corporations, but that they are public corporations, such that they are absolutely under the control of the legislature.

He also contends that if the provisions of section two of the act appointing these trustees for terms extending beyond the constitutional time is void, there was then a vacancy in the office of four of the trustees and that the remaining two might at once proceed to fill those vacancies.

The fallacy of this argument is answered by the act itself. By the very terms of the act there is nothing to determine which of these trustees is to hold until the first annual meeting, nor what ones will hold over until some future time, until they shall all meet and put in force the lottery provided for in this section. They are to

cast lots to see who shall wear the coat. Those who are to hold over have no right to perform any duties appertaining to their positions. And thus it happens that there are no trustees who can fill the vacancies and the district is without officers with which to carry on its business. Besides this there is absolutely no way of carrying this act into effect except by judicial legislation, that is, by an amendment to the act by judicial action.

The very terms of the act provides for full terms. By what right then can the court say that the legislature did not mean to
36 appoint these men for full terms but only intended to make provisional appointments. Judge Campbell in his opinion in the case of People *vs.* Hurlbut, on page 90 says:

"Assuming that the legislature could make provisional appointments to set an act in operation, this is not such action. The board appointed have no other or different powers than any of their immediate or remote successors would have. The law contains nothing requiring or authorizing any mere preliminary action. The officers are to hold by classified terms, just as the judges of the supreme court and board of regents did, for two, four, six and eight years, and no successors can be chosen short of the expiration of those periods without directly violating the terms of the law. It is not admissible construction to insert a meaning which is inconsistent with, and positively contradicts, the plain term of the statute. * * * It therefore follows, necessarily, that the statute can have no validity, because there is no lawful way of putting it in operation."

Just so in this case. It is not admissible construction to give this act a construction that is plainly opposed to the terms of the act. This act not only does not purport to provide for provisional appointments but the very terms of the act indicate that there was no intention to provide for anything other than permanent appointments.

It seems to us also that there can be no question about the officers of school districts being municipal officers.

Counsel Graves, in his brief, cites several cases decided by this court, to prove that school districts are not within the rule that municipal corporations are entitled by the constitution to the right of local self-government, and argues from the language used that these matters are under the absolute control of the legislature. The language used by this court in the cases cited by counsel must be construed in the light of the facts then under consideration.
37 When we consider the facts under consideration in those cases. we will see that the point under discussion was not involved in those cases no more than was the plenary power of the legislature over municipal corporations generally, involved in the case of Taylor *vs.* Railway Co., 80 Mich. 77, and other cases, where this court said: "Municipal corporations derive their sole source of power from legislative enactments." This language is true only in a qualified sense.

Their powers, as agencies of the Government, are subject to legisla-

tive control, but as representing the local community they have certain rights which are inalienable and which are beyond legislative control, and among these rights is that of self-government. In the case of Belles *vs.* Burr, 76 Mich. 1, cited by counsel, the court says:

"The whole primary school system was confided to the legislature and it cannot be said that the officers of school districts, chosen pursuant to the system adopted by the legislature, are constitutional officers."

This language when applied to the adoption of a primary school system is absolutely correct, as applied to the facts of the case then under consideration. But the question as to whether or not school officers are constitutional officers, was not involved, and this language therefore was not necessary to the decision of that case. We contend that school districts as now existing were in existance before the adoption of the constitution and that the constitution was adopted recognizing those districts with all their former attributes. We also say that school district officers are constitutional officers and that school districts are constitutional municipalities just as much as are townships and cities.

Article thirteen of the constitution, sections four and five, provides that a school shall be kept for at least three months in each year "in every school district in the State." And that "any school district neglecting to maintain such school shall be deprived, for the ensuing year, of its proportion of the income of the primary school fund." This is a clear recognition of the necessity of
38 providing for primary school districts in the "system of primary schools" to be adopted by the legislature.

And again, in article twelve, section seven, it is provided:

"The legislature shall provide by law for the removal of any officer elected by a * * * school district in such manner and for such cause as to them may seem just and proper."

This clause not only recognizes the existence of school districts as a part of the primary school system, but also recognizes that these school districts are to be municipal corporations and that they shall have the right of local self government the same as other municipalities do. It recognizes the fact that the officers of primary school districts are to be elected by those districts. In other words, it not only recognizes that these school district officers are to be chosen by local authority, but it also recognizes the fact that they must be elected by the qualified electors of those municipalities.

Our supreme court has on numerous occasions held that school districts are municipal corporations.

Seeley *vs.* Board of Education, 39 Mich., 486.
School District *vs.* Gage, 39 Mich., 484.

They preceeded the constitution and are recognized by that instrument.

Stuart *vs.* School District, 30 Mich., 69.
Belles *vs.* Burr, 76 Mich., 1.

But it is insisted that, although school districts are municipal corporations, they are purely public corporations, such that the legislature has absolute authority over.

The courts of this State and of the other States as well as the Federal courts, recognize a vast difference between the public functions of a municipal corporation and those of a local nature, and
39 hold that as to those matters which pertain exclusively to the General Government, municipal corporations are public corporations, but as — those matters which are of local concern they partake of the nature of private corporations and are governed by the rules applicable to such corporations.

Mr. Justice Story, in his opinion rendered in the celebrated case of The Trustees of Dartmouth College *vs.* Woodward, said:

"Another division of corporations is into public and private. Public corporations are *generally* esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the Government for public purposes, where the whole interests belong also to the Government." Page 668.

And again.

"It may also be admitted that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may at its will take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? * * * From the very nature of our governments, the public faith is pledged the other way." Page 694.

Judge Cooley in the case of People *vs.* Hurlbut, said:

"The municipality as an agent of government is one thing; the corporation as an owner of property is in some particulars to be regarded in a very different light. The Supreme Court of the
40 United States held at an early day that grants of property to public corporations could not be resumed by the sovereignty. When the State deals with a municipal corporation on the footing of contract the municipality is to be regarded as a private company."

Page 104.

See also, Board of Park Commissioners *vs.* Common Council of Detroit, 29 Mich. 228.

In the case of Town of Milwaukee *vs.* The City of Milwaukee, 12 Wis. at page 100, the court says:

"The difficulty about the question is, to distinguish between the corporation as a civil institution or delegation of merely political

power, and as an ideal being, endowed with the capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified or destroyed by the legislature; but in its capacity of owner of property, designed for its own, or the exclusive use and benefits of its inhabitants, its vested rights of property are no more the subject of legislative interference or control, without the consent of the corporators, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body. * * * In its character of a political power, or local subdivision of government, it is a public corporation, but in its character of owner of property, it is a private corporation, possessing the same rights, duties and privileges as any other."

See also:

Pearson *vs.* State, 56 Arkansas 148.
S. C. 35 Am. St. Rep. 91.
Mount Hope Cemetery *vs.* Boston, 158 Mass. 509.

41 In the light of these authorities it seems to us that there can be no question about the character of school districts in this State. They are municipal corporations, pure and simple, with all the rights appertaining to those institutions as recognized by the constitution of this State, and as such are entitled to the rights of local self-government, including the right to select the officers by whom the local concerns of the district are managed.

The same may be said of the provision of said act providing that the trustees of this new district shall be *ex-officio* a board of school inspectors.

School inspectors are constitutional officers, to be elected by the people of the several townships of this State at their annual township meetings in each year.

Counsel Graves says:

"It is certainly germane to provide who shall be the school inspectors of the very corporation created by the act."

The fallacy of this contention lies in the fact that counsel assumes that school inspectors are district officers. The constitution makes them township officers and not district officers. They have nothing to do with school districts, as district officers. Their duties appertain to the whole township.

The incorporation of this school district by special enactment of the legislature did not sever this territory from the rest of the township. It is therefore subject to the jurisdiction of the board, of school inspectors of those several townships except, perhaps, that the authority to make changes in the boundaries of this district was taken away from them, and such boundaries could not be changed except by a new act of the legislature.

The constitution says:

"There shall be elected annually on the first Monday of April, in each organized township * * * one township clerk who shall be *ex officio* school inspector, * * * (and) one school inspector, * * * whose powers and duties shall be prescribed by law."

42 Art. XI. sec. 1.

This provision of the constitution makes school inspectors constitutional township officers, and as such they are to be elected annually by the electors of the township. The qualification of voters, in townships, is different than it is in school districts. Only males can vote for township officers while females may vote for school district officers. How then can it be said that these trustees may be made *ex officio* a board of school inspectors, with all the powers and duties of school inspectors of townships.

It is also beyond the power of the legislature to appoint by legislative enactment constitutional officers. This act does that, both as to these school inspectors and as to the trustees of the school district. It is therefore void.

Counsel contends that if this is not the proper construction to be placed upon this act, then there would simply be a vacancy in the office of trustees and that this vacancy could be filled under the provisions of the general school law governing graded schools. He contends that if the provisions of section two shall be stricken out of the act the act may still stand.

We contend that this is not true for the very sufficient reason that such was not the intention of the legislature when they passed the act, and such is not within the contemplation of the act. If it be said that without this provision having been inserted in this law there was a plain provision of the general law for the carrying into effect this statute by having the trustees appointed under the provisions of the general law, then it is certain that it was the intent of the legislature to nullify and supercede that provision. And it is equa-ly certain that by striking out this provision of section two and having them so appointed the legislative will and intention would not be carried out.

Where by striking out an unconstitutional provision of a statute the rest cannot be preserved and carried out without violating the intent of the legislature, as shown by the act, then the whole
43 act must fall. It is competent to consider the unconstitutional part in order to ascertain the intent of the legislature. In looking at this act it is patent to anyone that the intent of the legislature was to take away from the people of this community the choice of the trustees until such time as is indicated by section two. With this provision stricken out we contend that there is no way of putting the act in force without going counter to the expressed will of the legislature. The provisions of the general school law do not apply to anything other than districts that are organized under the general school law. This district is established by a special act of the legislature, which has given it a special charter and can only

be put in operation by a special provision in the law creating the corporation.

Section seven of this act transfers all of the property of the old districts, to the new, of every name, kind and nature, without making any provision whatever for an equitable division thereof between the territory included in the new district and the territory left out. This we contend cannot be done.

The rule of law is universal that when a municipality is divided the property may be divided and apportioned to the territory remaining in the old municipality and that set off, provided provision is made by law therefor, but that if no provision is so made for apportioning the property it belongs to that part of the old municipality still remaining.

Township of Saginaw *vs.* School District, 9 Mich. 541.
Town of Milwaukee *vs.* City of Milwaukee, 12 Wis. 93, 104.
The Inhabitants of Windham *vs.* The Inhabitants of Portland, 4 Mass. 384.
Medford *vs.* Pratt, 4 Pick. 222.
Brunswick *vs.* Dunning, 7 Mass. 445.
Hampshire *vs.* Franklin, 16 Mass. 76.

The report of these old school districts was as much private
44 property as though it had been owned by private individuals and was no more subject to legislative control. It could not be taken away by any act of the legislature. The celebrated case of The Trustees of Dartmouth College *vs.* Woodward, 4 Wheaton, 518, settled this matter for all time.

The Constitution of the United States, art. 1 sec. 10, subdivision 1, provides that: "No State shall * * * pass any * * * law impairing the obligation of contracts."

The constitution of this State also provides in art. IV, sec. 43, "The legislature shall pass no * * * law impairing the obligation of contracts."

These provisions of the Federal and State constitutions prohibit the legislature from passing any law to divest a municipal corporation of its property.

Town of Milwaukee *vs.* City of Milwaukee, 12 Wis. at 101–103.
State *vs.* Haben, 22 Wis. 660.
Dartmouth College *vs.* Woodward, 4 Wheaton, 518.
People *vs.* Hurlbut, 24 Mich. 44.
Pearson *vs.* State, 35 Am. St. Rep. 93.
Mount Hope Cemetery *vs.* City of Boston, 158 Mass. 509.

Counsel Graves in his brief says:

"The exact question involved here was decided by this court in the case of Perrizo *vs.* Kesler, 93 Mich. 280."

This we deny. In that case there had been a consolidation of school districts into one new one, and the property of the old districts was transferred to the new, and the debts of the old districts were made the obligations of the new. In that case the question

was as to the validity of the law for the reason that some parts of the new district had already expended a much larger sum for school property than other parts had done and if the consolidation was allowed to stand, the old districts which had expended
45 the most on their school property would have to stand just as heavy a burden in the payment for new property as those parts which had not paid out anything to speak of for property prior to the consolidation. There was no question in the case of the division of a municipality, nor of the confiscation of the property of a municipality by legislative enactment.

It the case of The Town of Milwaukee *vs.* The City of Milwaukee, *supra* the exact question involved in this case was considered and decided. In that case there had been a division of the territory by legislative enactment and the question of the effect of this division on the property rights of the old and the new municipalities was very ably discussed by the court and a long list of authorities cited. In that case the statute was silent on the question of the property but the city of Milwaukee contended that the effect of the act was to transfer the property in question to the city, and the court in deciding the case, on page 102, says:

"If the legislature, in the present instance, without the assent of the town, had attempted, by act, directly to transfer the lands in question to the city, * * * could any lawyer be found who would hesitate for one moment to give his opinion that such legislation was void? And could the legislature, by indirect means, accomplish that which it was impossible to do by direct? Did it possess this power as an incident to that of enlarging the limits of the city or diminishing those of the town? We think not."

The language in that case, we think, is peculiarly applicable to this case for the reason that the case presumed, was precisely such a case as this one is, and the case actually decided was, in all of the essential features the same.

We do not deny the power of the legislature to divide the territory of a municipality, neither do we deny the authority of the legislature to consolidate several municipalities into one new
46 corporation. We also admit that when the legislature sees fit to divide the territory of a municipality it may make provision for the equitable division and distribution of the corporate property. It may also, in case of consolidation, transfer to the new corporation all of the property of the old municipalities. But what we do contend is that where the legislature divides a municipality it cannot take the property away from the old municipalities and transfer it to the new.

In the case of The Town of Milwaukee *vs.* The City of Milwaukee, *supra*, the court said:

"If the legislature could, by virtue of its power of division, or repeal, deprive a town of its property; and if, after having created it and incited it to such acquisitions, by giving it the capacity, it should do so, such proceeding would be in the highest degree, arbi-

trary and indefensible. The perfidy of such an act would be acknowledged by all men.

We do not, however, wish to be understood as saying that the legislature may not, upon the repeal of the charter of a municipal corporation, or division of its territory, provide for a fair and equitable division of its public property. It may undoubtedly do so."
Page 103.

Section ten of the act confers upon this board appointed by legislative enactment the arbitrary power to take the property of these old districts, dispose of it at public or private sale, and then take it to the village of Jerome and permanently affix it to the school building there situate. It does not leave it to the discretion of the board of trustees as to what shall be done with this property but says that it is to be used in the making of repairs, improvements and additions to the property in the village of Jerome. And in order to place the matter beyond the control of the people interested in the matter, the act confers this authority upon the board which was appointed by the act, *and no other*. And in order to make sure that this board shall make this confiscation complete before the people can, by any possibility, have any voice in the matter, authority is given
47 to this board to sell this public property at private sale. It would seem that there was some ulterior motive actuating some one in thus robbing the people of this community of the last vestige of the right of local self-government. But this is not all.

Instead of allowing the local authorities,—the boards of school inspectors of the several townships in which these old districts were situated,—to use their discretion in the disposition of the territory remaining, not included in this new corporation, the act in section eleven fixes definitely what shall be done with this territory and what districts it shall be attached to. It entirely leaves out of consideration the board of school inspectors of the township of Moscow and says that the board of school inspectors of the township of Somerset shall act alone, notwithstanding a large amount of this territory lies within the township of Moscow.

Counsel Graves seeks to justify this provision by contending that the legislature by this act placed the disposal of this territory precisely where it would have been had not this provision been inserted. The fallacy of this argument is apparent at a glance. In the first place the act does not do anything of the kind. If the act had been silent about this matter the territory would have been disposed of by the boards of school inspectors of both townships of Somerset and Moscow, and these school inspectors would have been allowed to exercise their discretion in the disposition of this territory. In this act the school inspectors of the township of Moscow have no voice in the matter, neither has the board of school inspectors of the township of Somerset, except that they can and must attach this territory, whether lying in Somerset or in Moscow to districts lying in whole or in part with- the township of Somerset. It makes no dif-

ference how much it will inconvenience the parties who own the lands lying in Moscow, they *must* be annexed to some district lying wholly or partly in the township of Somerset.

This is not all. Section nine of the act fixes forever, unless changed by legislative enactment, the location of the central
48 building of said school district. Absolutely no discretion is left to the district. It must have this one place, and as if to make it entirely beyond question, the act provides what classes must be heard in this building. If these provisions do not deprive this municipality of the right of local self-government, we would like to have counsel for respondents point out some way in which it could be accomplished. If there was not an ulterior motive which actuated the enactment of this statute the circumstantial evidence is very deceptive. These latter provisions prove conclusively the reason for making the appointment of the officers permanent, instead of provisional. Had they been provisional there would have been no time in which to dispose of all of the property belonging to the old districts and get it permanently fixed in the village of Jerome before the people interested could have a voice in the matter. By making these appointments permanent there would be nearly three years in which to accomplish the purpose, and it would be nearly two years before the people, by any possibility, could control the board of trustees. Thus it shows the legislative intention in the passing of this act. It was not to benefit the people generally of these old districts but to further the interests of the people of the village of Jerome.

They did not propose to let the people outside of the village have anything to say about the matter until they had gotten everything securely fixed. They also did not propose to leave the matter so that it could be changed by local officers. They had matters nailed down solid by legislative enactment, so that the only way to change them was by a like legislative enactment.

In order to further serve the interests of the village of Jerome and make sure that the people outside of that place should have absolutely no voice in the matter, they appoint five of the six trustees from residents of the village of Jerome. These are the "men of experience" spoken of by counsel, Sampson and Stone in their brief on pages 7 and 8.

49 II.

We next contend that this act is unconstitutional and void for the reason that it has a double title. The title to the act indicates and the body of the act embraces more than one object.

The constitution provides, art. IV, sec. 20.

"No act shall embrace more than one object, which shall be expressed in its title."

This constitutional provision has a two-fold purpose. In the first place it prevents the title and act embracing more than one object,

and secondly, it prevents the act being broader than the title. The title must be an index to the act. By this we do not mean that the act must simply be a re-enactment of the title, but it must fairly apprise those interested in the matter what is to be covered by the act.

This constitutional provision is mandatory, and any enactment of the legislature which violates it is either partly or wholly void. If it violates the provision relative to the duplicity of subjects by indicating in the title and including in the act more than one object the act is entirely void. If the act simply violates the provision by being broader than the title, the act may and may not be entirely void, but at least the provisions which are not covered by the title are void. There is always a presumption that an act of the legislature is constitutional. This presumption however is only a presumption. If however the act is broader than the title so that the court holds certain of its provisions void the presumption then shifts, and the presumption then is that the legislature would not have passed the act without the provisions that have been held unconstitutional. This presumption is more or less strong according to circumstances.

Cooley's Constitutional Limitations, *178–179.

In the note to the above Judge Cooley says:

"It must be obvious in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case, we know the legislature designed the whole act to have effect, and we should sustain it if possible; in the former, we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were void, and there is generally a presumption more or less strong to the contrary. While therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be control-ed or modified in the construction and effect by the part which was void."

The learned author, on page *148, says:

"If the title to the act actually indicates, and the act itself actually embraces, two distinct objects, when the constitution says it shall embrace but one, the whole act must be treated as void, from the manifest impossibility in the court choosing between the two, and holding the act valid as to the one and void as to the other."

He also says, on page *149:

"As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the

matters indicated by the title, but which must be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no despensing power; *the constitution has made the title the conclusive index to the legislative intent as to what shall have operation;* it is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so.

See also Fidelity Ins. etc., Co. *vs.* Railroad Co., *supra*, on
51 page 862, where the court also says:

"When the title is general, as it may be, all persons interested are put upon inquiry as to anything in the body of the act which is germane to the subject expressed; but when the title is restrictive, *and confined to a special feature of a particular subject*, the natural inference is that *other features of the same general subject are excluded.*"

Now, to apply these principles to the act in question. In the first place let us look at the title and see what its provisions are and ascertain whether there is more than one object indicated in this title, and also ascertain whether there are any things embraced in the body of the act which are not provided for in the title. Also, in this connection, it will be well to ascertain whether the title is so restrictive that it excludes things which otherwise might have been included in the act.

The first part of the title of this act is: "An act to incorporate the public schools of the village of Jerome, Hillsdale county, Michigan." This would have been a sufficient title to have warranted the legislature in including any and every provision necessary to have provided for the machinery necessary to the carrying into effect of the act, including the providing, appointing, or electing provisional officers; providing for the choosing of permanent officers, defining and fixing their powers and duties, as well as fixing the boundaries of the district.

In fact this title would have allowed every provision necessary to the proper carrying out of the legislative intent in the conducting of this school. This would have been one definite object, viz:—the incorporating and equipping, so to speak, of this school district.

But the title does not stop there, but further says to:—

"Provide for the *election* of trustees, and fix their powers and duties."

When it thus says to provide for the *election* of trustees, it thereby restricts the title and limits the act to providing for the *election* of
52 trustees and does not allow the appointment of trustees, either provisional or permanent. This then makes the provisions of section two entirely void.

There is nothing said in the title about the electing or appointing of school inspectors. In fact, the title nowhere intimates that the act is to, in any manner, provide for school inspectors, while section four of the act makes the trustees of this district *ex officio* a board of

school inspectors with all the powers and duties of school inspectors of townships. As we have already said, school inspectors are constitutional township officers, and there is no power vested in the legislature to provide for them outside of townships, except in cities, which are construed to be townships in this respect. There is also no power vested in the legislature to appoint, either provisionally or otherwise, constitutional officers.

There is also nothing in the title of this act that would give the parties interested any intimation that there would be any attempt to confiscate the property of the old districts. Had there been anything to lead the old districts to think any such effort would have been made the parties would have had a chance to have protected themselves.

After providing for everything relative to this corporation the title then provides for the "distribution of the territory of the disorganized districts." This would carry with it the disorganizing of the old districts. This provision of the title is entirely foreign to the rest of the title. The body of the act provides for the disposition of the territory, as we have heretofore pointed out. This certainly makes the title double the act void because of duplicity in the title and in the body of the act. Counsel Graves contends that this does not make the title double, but says that "the evident object of this act was to change the school facilities in certain defined territory in Hillsdale county, which territory at the time consisted of three separate districts. In order to accomplish this purpose it was necessary for the legislature to provide for the disposition of all the territory included in these three districts. * * * The object was
53 single. It was to provide different school facilities for the three old districts. Because to accomplish this purpose it was necessary to legislate concerning three different districts and dispose of a portion of their territory in one way and the other portion in another way, does not make the act or its title double."

The trouble with this contention is that it attempts to make a new title for the act in order to save it. Judge Cooley in his work on Constitutional Limitations, as heretofore quoted, says that the constitution *has made the title the conclusive index to the legislative intent as to what shall have operation.*

The title to this act says that the object of the act is to incorporate the public schools of the village of Jerome, not to provide for different facilities for education *outside of the public schools of the village of Jerome.* When an act is passed for the creation of a municipal corporation it is not admissible construction to say that the legislature had in mind doing some other thing. Nothing is germane to the title except those things which properly appertain to the municipality thus created.

What interest could it possibly be to the public schools of the village of Jerome what becomes of the territory of the old districts, which was left out of the new corporation? Would counsel contend for one moment that the legislature could have created, *by one act,*

two or more municipal corporations out of the three old ones? (*There were in fact four old ones instead of three as stated by counsel.*)

If the legislature could provide for the distribution of the territory of these old districts by providing that it should be attached to certain other districts, why could they not have created two or more entirely new school districts out of the territory of these old districts? The courts have held that it is not competent for the legislature to pass an act incorporating three distinct corporations, *or reviving by name three obsolete charters.*

Ex parte Conner, 51 Ga. 571.

It was decided by this court in the case of The People *vs.*
54 Denahy, 20 Mich. 349 that a law which provides for the expenditure of certain highway taxes on two distinct State roads, and for the location and construction of a third State road, and for the expenditure of certain other taxes upon that road, is unconstitutional as embracing more than one object.

This court also held in Ryerson *vs.* Utley, 16 Mich. at page 277, that an act entitled "An act for the preservation of the Muskegon River improvement," would not warrant the insertion of a section providing for the payment of a claim for the original construction work.

It was also held by this court in Brooks *vs.* Hydorn, 76 Mich. 273, that act No. 200, of the Session Laws of 1889, which assumed to reduce the number of justices of the peace of the city of Grand Rapids to two, and to legislate two of such officers out of office, was unconstitutional, the title failing to indicate any such object, which is the main purpose of the act, to which all else is secondary.

In the case of Grand Rapids *vs.* Judge, 93 Mich. 469, this court held that an act, the purpose of which was to enable cities and townships to acquire, either by purchase or condemnation, the whole or any part of the road beds and franchises of toll or plank road companies within the corporate limits of such city or township, which also in the title and in the body of the act provided that any such toll or plank road company might sell any portion of all of its road or franchise *to any other person or corporation*, was unconstitutional and void.

It was held by this court in the case of Ellis *vs.* Hutchinson, 70 Mich. 154, that it was not competent for the legislature to so amend the act which provided for the punishment of the offense of embezzling property held under a contract of sale, so as to include the embezzlement of property covered by chattel mortgage, because it was a different object than that expressed in the original title to the act.

The constitution of Minnesota contains the same provision as that contained in our own, except that the word "subject" is
55 used in the place of the word "object" used in ours. In that State, it was held, in the case of State *vs.* Kinsella, 14 Minn. 524, that where an act was entitled "An act to incorporate the vil-

lage of H" it was not competent for the legislature to insert a provision for the division of the town and the organizing of a new town. This was held to be a violation of the constitutional provision that no law should embrace more than one subject and that must be expressed in the title. This Minnesota case is almost on all fours with the case at bar. It is seldom that a case can *can* be found that is so nearly on all fours as is the case of State *vs.* Kinsella with this case.

Many more cases might be cited, but we think we have cited enough to show that the courts treat this provision as mandatory and that whenever the courts find that the act is in violation of this constitutional provision they always hold it void.

In all of our research we have failed to find a single case where an act of the legislature has been saved where the court found that it was in violation of the provision of the constitution relative to duplicity of subjects. In our research we have also been unable to find a single case where the courts have upheld any provision that was not germane to the main object expressed in the title of the act. The case cited by Counsel Graves, Toll *vs.* Jerome, 101 Mich., 468, relative to the holding of court in the sixteenth and thirty-first judicial circuits, is not in point. In that case there was certainly only one general object, as held by this court, and that was to provide for the trial of cases in those two circuits.

In this case it is entirely different. The object of the act is to incorporate certain territory into a school district,—create a new municipal corporation,—and the disposition of the territory outside this municipality is entirely foreign to that object.

For these reasons we contend that this act is unconstitutional and void, and that the decision of the lower court was correct.

LYON & McINTYRE,
Solicitors for Relator and Appellee.

56 EXHIBIT J.

STATE OF MICHIGAN :

In the Supreme Court.

Error to the Circuit Court for the County of Hillsdale.

ATTORNEY GENERAL *ex Rel.* L. E. KIES ET AL., Relators,
vs.
THOMAS J. LOWREY ET AL., Respondents.

Statement of the Case.

The information in this case is filed to test the right of the relators to act as officers of a certain school district, organized by special act of the legislature of 1901, which said act is "act No. 315, Local

Acts of 1901," and the only question in the case is whether or not said act 315 is constitutional.

Record, page 22, bottom of page.

57 *Brief for Respondents.*

Before proceeding to a discussion of the validity of the particular act in question, we think it proper to call attention to what this court has said as to its duty in passing on the constitutionality of acts of the legislature. In the very early case of

Scott *vs.* Smarts' Ex'rs, 1st Mich., page 295,

this court said, on page 306:

"For us to hold a law unconstitutional it must be a plain violation of some provision contained in the constitution."

And this seems to be the universal rule.

Am. and Eng. Enc. of Law, second edition, pages 1084 to 1087.

On the argument in the trial court the principal objections to the constitutionality of the act in question were grouped under three heads, as follows:

1st. The title to said act is bad, for the reason that it includes more than one object, and the whole act is thereby unconstitutional.

2d. The provisions in said act, fixing the expiration of the term during which the trustees named therein should hold office is bad, for the reason that it fixes such term of office for a period longer than the legislature has power to do, and the whole act is thereby unconstitutional.

3d. The provisions of said act, relative to the disposition of the property belonging to the district disorganized by said act, amount to a confiscation of such property, and the whole act is thereby unconstitutional.

58 Other objections were urged on the argument, but we think they are fairly included in the above subdivisions, and we will therefore briefly give our reasons why we think the act constitutional, as against the objections above noted.

Taking up the question whether or not the title includes more than one object and is therefore in violation of art. 4, section 20, of the constitution, we insist that this question ought not to be considered in this case, for the reason that it is nowhere raised by the replication. While the replication is very full and complete in setting out the alleged infirmities in the act it nowhere alleges that either the title or the act itself contains more than one object. The only reference to any inconsistency or defect in this respect is found in paragraph 2 of the replication,

Record, page 8, bottom of page,

which simply says, "There are many of the provisions of said act that are not within but are outside of the title of said act," and fails,

either in paragraph 2 or elsewhere, to point out the specific provision complained of. We therefore submit, that this act cannot be declared unconstitutional by this court as containing more than one object, either in the title or in the act itself, for the reason that this objection is not raised by the pleading.

Should this court, however, see fit to pass upon this feature of the act, then we insist that both the title and the act has just
59 one object, which is cleary expressed in the title and no more. This object is *the creation of a new school district*, and nothing but what is germane and necessary to the accomplishment of that object is to be found either in the title or in the bill.

In the leading case of the

People *vs.* Mahaney, 13 Mich., 481,

Judge Cooley, in discussing this precise question, on page 495, says:—"But this purpose is fully accomplished when the law has but one general object, which is fairly indicated by its title. To require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act, relating to that alone, would not only be senseless but would render legislation impossible."

To the same effect is the case of

Diana Shooting Club *vs.* Lamareaux, 89 N. W. Rep., 880,

decided by the Supreme Court of Wisconsin, April 1st, 1902, where this question is exhaustively and logically discussed, under a provision of their constitution almost literally like our own. In laying down general principles which govern courts in passing on the question whether or not the statute is contrary to that provision of the constitution, that court, on page 882, says: "It has been repeatedly held that the title of the act should be literally construed; that it should not be deemed as insufficient to constitutionally suggest those things found in the body of the act unless, giving thereto the largest scope which reason will permit, something is found therein which is neither within its literal meaning, nor its spirit, nor germane thereto. Courts cannot sit in judgment upon the work
60 of the legislature and decide one of its acts unconstitutional, merely because the title thereof is not as comprehensive as it might have been made. Within all reasonable boundaries, legislative discretion in that field cannot be rightfully interferred with."

And again, on page 883:—

"Probably as comprehensive a rule as can be found stated in the books for testing the sufficiency of a title to a private or local legislative act, is the one deduced from the authorities by the New York court of appeals. When one, reading a bill with the full scope of the title in mind, comes upon provisions which he could not reasonably have anticipated, because of their being in no way suggested by the title in any reasonable view of it, they are not constitutionally covered thereby. But in applying that rule, this other rule, which has been universally adopted, must be kept in mind. The statement

of a subject includes, by reasonable inference, all those things which will or may facilitate the accomplishment thereof."

True, in both the case of People *vs.* Mahaney and the Wisconsin case, the objection raised was that the title was too narrow to admit of the provisions contained in the act, but we think it needs no argument to show that if all the matters of detail contained in the act are constitutionally grouped therein, under the narrow title, it would not render the act void because they were referred to in the title, and the two cases above cited seem to us to cover this question so comprehensively that we do not feel justified in asking this court to examine the numerous cases supporting the same principle to be found in the reports of both our own State and elsewhere.

61 Passing to the consideration of the question of whether or not the provisions of section 2, of said act, relative to the term during which the trustees therein named shall hold office, are unconstitutional, and that therefore the whole act is void, we wish to first call attention to the *power* of the legislature regarding school districts, as fixed by this court.

In the case of

Perrizo *vs.* Kesler *et al*, 93 Mich., 280,

this court, on page 283, speaking by Chief Justice Morse, says:—

"It must be remembered that the constitution of 1850 left to the legislature, as did the preceding constitution, the establishment of a system of primary schools, restricting the legislature only by providing that a school shall be kept, without charge for tuition, at least three months in each year, and that all instruction in said schools shall be conducted in the English language. All other matters seem to be within the discretion of the legislature."

This language was cited with approval by this court, in the case of

Pingree *vs.* Board of Education, 99 Mich., 404,

and after citing it, on page 408, this court, by Justice Long, on page 409, further adds:—

"It is apparent that, with the restrictions mentioned in Perrizo *vs.* Kesler, the whole primary school system was confided to the legislature by the constitution."

The power of the legislature to form municipal corporations, including school districts, by special acts, either from unor-

62 ganized territory or by disorganizing old districts and rearranging the territory, has been so often exercised, and so often approved by this court, that we do not deem it necessary to cite instances in this brief. As a necessary adjunct to this power, the legislature has not only the right but it becomes its duty to appoint in a creative act provisional officers for the new municipality. Indeed, we do not understand that either of these rights is questioned in this case. As we understand the claim of relators, their only criticism of the provisions of section 2 in this act is, that it assumes to fix the *term* during which part of the provisional officers shall hold their position to extend beyond the first annual meeting of the

new district, thereby depriving the electors of said district of the right to elect an entire board of trustees at the first annual meeting, or, as stated in the replication, paragraph 5, "thus depriving said district of the right of local self-government." This same criticism is also stated in different ways in paragraphs 6, 8, 9, and 10.

Record, pages 10 and 11.

Bearing in mind that this court has said in Perrizo *vs.* Kesler, *supra*, that the constitution leaves the entire matter of primary schools to the legislature, "restricting the legislature only by providing that a school shall be kept, without charge for tuition, at least three months in each year, and that all instruction in said schools shall be conducted in the English language," where is there room for the charge of unconstitutionality simply because the legislature, in a particular case, sees fit to so provide that all the trustees of a new district shall not go out of office at the same time? As will be seen from an examination of the act,
63 the provisional trustees were selected by the legislature from the existing officers of the old districts, presumably familiar with the needs and wishes of their constituents. Certainly it was prudent, and we insist legal, for the legislature to so provide that these provisional officers, who had already been selected by the electors of their respective districts to look after the important matter of the primary schools, should retire from their positions gradually, thus retaining for the new district the benefit of their experience for a time. In fact, we might go farther and insist that the legislature had the *power* to limit the rights of the electors to a much greater extent than they did in this case. "Suffrage is a privilege, not a right," and the legislature has the right, in special instances, to limit and restrict this privilege. The right of the electors to select school officers by ballot is a *statutory*, not a *constitutional* one, and the same power which gave the right may limit or restrict it at pleasure. The general school law gives women the right to vote for school officers, when possessing the statutory qualifications, but the legislature may, by special statute, take away that right in a particular school district, and even deprive the male electors of the right to hold an annual school meeting.

And this court, speaking through Justice Hooker, in the case of Keweenaw Association *vs.* School District, 98 Mich., 437, says, on page 440, near bottom of page:—

"It is no new thing for the legislature to fix the boundaries
64 of school districts. It is done by the charter of nearly every city or village in the State, and some of them go so far as to provide exceptional methods of electing officers, and limiting the classes entitled to vote. Certainly these are as destructive of the system referred to as the act in question, but none of these acts have ever been held invalid. On the contrary, the legislative intent has been invariably carried out where they have been brought before the court."

We earnestly insist that, under the decisions above cited, the power of the legislature to fix the terms of office of the trustees, as fixed by this act, is clearly within its constitutional limitations. Even more explicit in this connection is the language of the court in the case of

Belles *vs.* Burr, 76 Mich., page 1,

where this court, by Judge Champlin, on page 11, says:

"The authority granted by the constitution to the legislature to establish common or primary school systems carry- with it the authority to prescribe what officers should be chosen to conduct the affairs of the district; to define their powers and duties, *their terms of office, and how and by whom they should be chosen.*"

It seems clear to us that if the legislature has the *power* to fix the term of office of school officers by *general* law, it also has the *power* to fix the term of office of the provisional officers appointed by itself by *special* act.

Nor are the electors of the district here complaining. Had the electors, at the annual meeting, in July, 1901, elected a full set of trustees, and had the trustees so elected made a demand on
65 respondents to be let into their respective offices, and been refused, and then brought this action to oust respondents, a different question would be raised. No claim is made that anyone excepting these individual relators are in any way complaining.

The record fails to disclose whether these relators are residents of the new district or not. If residents of the new district they certainly cannot be heard to complain because the act transfers to the new district certain property to which it might not equitably be entitled, so long as the residents of the territory thus deprived of its property do not complain. If these relators are residents of the territory formerly included within the disorganized districts but not included in the new, it certainly is no concern of theirs who are or are not officers of the new district.

We earnestly insist that, under the provision in section 2 of said act, which provides that the term of office of the provisional officers thereby appointed "shall continue until their successors shall be elected and qualified," the right of respondents to hold their position cannot be questioned. For the purposes of this argument we might admit that so much of section 2 as fixes the term of office of the provisional officers to continue beyond the first annual meeting is unconstitutional, and yet relators would gain nothing, for it would leave the remainder of the act valid, and respondents secure in their seats, as provisional officers merely, until their successors are elected and qualified.

66 Coming now to the third ground of complaint, viz., that the act confiscates the property of the disorganized districts, and is therefore unconstitutional, we insist that the decisions hereinbefore cited, as to the *power* of the legislature in all matters relating to school districts, *clearly establishes the power of the legislature to nact the law under discussion.* An examination of the replication

fails to show what section of the constitution relators claim is violated by the provisions of the act relative to the disposition made of the property of the disorganized districts. In fact, more fault seems to be found with this feature of the act because it is claimed that it conflicts with the general school law, than because it conflicts with the constitution. When we establish the *power* of the legislature to enact a *general law* providing for the distribution of the property of the disorganized districts by the school inspectors—as the general school law now does—it seems to us that it necessarily follows that *the legislature may also exercise the same power in case it sees fit, by special legislation, to disorganize old districts to form a new one.* To hold otherwise would be to hold that the legislature can delegate to the board of school inspectors—a body created by itself—greater powers than it can itself exercise. The act in question turns over to the new district all the property of the disorganized districts and makes the new district liable for all the debts and obligations of the old. Nowhere is it claimed that there is anything inequitable in this provision, nor is any citizen here complaining that any of his individual property rights are infringed by the act. There is nothing to indicate that any different disposition is made of the property by this act than the school inspectors would have made had this provision been omitted from this act and the disposition of the property left to the inspectors, under the general law. Indeed, we might admit—which we do not—that this provision can be stricken out of this act, and the vital part, viz., the creation of the new municipality, with the respondents secure in their position as provisional officers, remain in effect by such holding.

We therefore respectfully ask, that the judgment of the trial court, ousting these respondents, be reversed.

F. H. STONE AND
W. J. SAMPSON,
Attorneys for Appellants.

67 EXHIBIT K.

Opinion.

Supreme Court of the State of Michigan.

THE ATTORNEY GENERAL *ex Rel.* L. E. KIES and Others
vs.
THOMAS J. LOWREY and Others.

At its 1901 session, the legislature passed local act 315, entitled "An act to incorporate the public schools of the village of Jerome, Hillsdale county, Michigan; define the boundaries thereof; provide for the election of trustees and fix their powers and duties; and provide for the distribution of the territory of the disorganized districts."

By this act it sought to incorporate in one union and graded school district, lands described in the bill, which had previously been divided between several primary school districts. It named the persons who should constitute the first board of trustees, and provided for the distribution of long and short terms between them, by lot, their successors to be elected by the electors of the district, shortly before the expiration of their respective terms.

It provided that the primary and graded school law should apply to this district, and it may be said in a general way, that it gave to the new district the property within its limits, which had belonged to the respective districts from which it was created. It also required the new district to assume and pay the outstanding debts and obligations of the old districts.

The new district did not include all of the lands comprised in the several districts from which it was organized, and the act provided that within thirty days after the act should take effect, the
68 board of school inspectors of the township of Somerset should meet and attach to other school districts, the portions of the several districts not included in the new.

This proceeding is in the nature of a *quo warranto* against the persons constituting the board, to inquire into their right to exercise and enjoy the office of trustee of said new district, which they were doing, at the time the proceeding was instituted, in the effort to carry out the provisions of the act. It was commenced in October, 1901, and it cannot be said to have been unreasonably delayed.

Counsel for relator attack the validity of this legislation. Their brief states the points thus:

First. It deprives this school district or municipality of the right of local self government, guaranteed to all municipalities by the constitution.

Second. The title to the act indicates and the act itself embraces more than one object.

Third. The act is broader than the title, the body of the act embraces many objects not covered by the title.

Fourth. The act as passed impairs the obligation of contracts, within the meaning of the Constitution of the United States and the constitution of the State of Michigan.

I. Does this act impair the right of local self-government?

Cases have, of late, been frequent where legislation has been said to impair this right of local self-government, and it would seem that different views are entertained by counsel and by the public, as to the character and extent of this alleged right. It may therefore be profitable to consider briefly what it is, whence it is derived, and whether it has limitations upon it, or is itself a limitation upon the authority of the State.

It is often alluded to under the name of "home rule." As descriptive of a policy, home rule is a significant and appropriate term, but as descriptive of a right, it is indefinite, for it is co-exten-

sive with the right of local regulation or control and its extent must always be tested by the constitution.

The State, consisting of its electors, has absolute political power, except as limited by the Federal Constitution.

Until the electors have adopted a constitution there is no public corporation either municipal or quasi municipal that can resist the authority of the State, which has power to create both, and
69 to destroy them, and to make governmental agencies of them.

It is not necessary to discuss municipal corporations proper, because we are not dealing with one, so we may pass them with the suggestion that under repeated decisions, they exist through the action or acquiescence of the State, or subject to regulation and control by the State, except as qualified by the provisions of the United States Constitution, and this has application to interests in the nature of private rights only, which such corporations have and enjoy.

The quasi corporations are radically different. They consist of counties, townships, school districts, highway districts, etc. They are governmental agencies, and it is to say the least, doubtful if they are in any respect anything else, or have any rights that can be called private. They perform many functions, but these are for, and about the business and policies of the State, which has imposed upon them the responsibility and expense of maintaining highways, schools, drains, bridges, etc. This may be called a right or an obligation, according to the views of the citizen who is taxed locally for the several purposes, but whatever it is called, it depends upon the constitution or law of the State, and otherwise would not exist. If upon the constitution, the legislature has not the power to change it, but if upon an act of the legislature, it is so subject to change.

There is danger of confusing rights derived from these different sourses, and it is possible to erroneously conclude that any apparent injustice in legislation is an invasion of local rights of self-government and therefore invalid, when that can be truly said only of such as invade constitutional rights of self-government.

The school district is a State agency. Moreover, it is of legislative creation. It is true that it was provided for in obedience to a constitutional requirement, and whatever *me* may think of the right of the district to admininister in a local way the affairs of the district under the constitution, we cannot doubt that such management must be in conformity to the provisions of such laws of a general character as may from time to time be passed, and that the property of the district is in no sense private property, but is public property devoted to the purposes of the State, for the general good, just as the almshouses and court houses are, although
70 confided to local management, and applied to uses which are in a sense, local, though in another sense general.

We insert here from counsel's brief, the alleged infringements upon local rights, upon which reliance is placed.

(*a.*) The act names and appoints for definite terms (not provisionally) the officers of this municipality.

(*b.*) It fixes definitely the site of the central school building for said district and the uses to be made of said building, and does not allow the resident tax-payers and voters any voice in the matter.

(*c.*) It gives arbitrary power to a board appointed by legislative enactment (and to no other) to confiscate the property of the old districts and fixes definitely what is to be done with this property, thus depriving the resident tax-payers and voters of all voice in the matter.

(*d.*) It fixes definitely what shall be done with the property of the old districts, and the uses to which it shall be put, and leaves absolutely no discretion in the local authorities nor in the trustees of said district.

(*e.*) It fixes definitely what shall be done with the territory of the old districts, not included in the new district, and appoints by legislative enactment the officers that are to make the disposition of this territory.

(*f.*) It appoints by legislative enactment a board of school inspectors for this district, which are constitutional officers, and deprives the local tax-payers and voters of all voice in the matter.

Among the above points our attention is naturally called to "*c*," wherein it is stated that the territory excluded is deprived of any share of the public property.

It does not seem to be denied that the legislature may change the boundaries of districts. That has been too often done to admit of question. Numerous school districts have lost territory through city charters, and the case of Keweenaw Association *vs.* School Dist. No. 1, 98 Mich., 437, is conclusive upon the point. See also Perrizo *vs.* Keesler, 93 Mich., 280, and Pingree *vs.* Board, 99 Mich., 408.

The authority of the legislature to change the boundaries of counties, townships, and school districts does not necessarily involve the obligation to reimburse the portion deprived of the use of the public property. Frequently such laws contain provisions for the purpose, but it is not necessary. The property is public property, held and used for the purposes of the State, which may, in the absence of constitutional prohibition, make such disposition of it as it sees fit. Mr. Dillon, in his work on Mun. Corp. No. 126, in discussing the *the* enlargement of boundaries states the general rule:

71 Not only may the legislature originally fix the limits of the corporation, but it may, unless specially restrained in the constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation that the property thus brought within the corporate limits will

be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the legislature to determine.

A copious note fully vindicates the text.

Again, sec. 127, he says:

In connection with the power of the legislature to create municipal corporations and to determine their territorial extent, reference may be made to the division of towns or public corporations by legislative act or authority. There is no restriction on the general power, unless it be found in the constitution of the State. In case of division, the legislature may, as we have already seen, apportion the burden between the two, and determine the proportion to be borne by each. In Connecticut, "the legislature," says the supreme court, "have immemorially exercised the power of dividing towns at its pleasure, and upon such division, apportioning the common property and common burdens in such manner as it shall seem reasonable and equitable." Accordingly, it may impose in one town, upon such division, the entire expense of erecting and maintaining a bridge across a river which is a dividing line between the two towns.

And again in sec. 128:

So it has been frequently held that if a new corporation is created out of the territory of an old corporation or if part of its territory or inhabitants is annexed to another corporation, unless some provision is made in the act respecting the property and existing liabilities of the old corporation, the latter will be entitled to all the property, and be solely answerable for all the liabilities.

In farther elucidation of this we quote sec. 129:

But upon the division of the old corporation, and the creation of a new corporation out of a part of its inhabitants and territory, or upon the annexation of a part to another corporation, the legislature may provide an equitable appropriation or division of the property, and impose upon the new corporation, or upon the people and territory, thus disannexed, the obligation to pay an equitable proportion of the corporate debts. The charters and constituent acts of public and municipal corporations are not, as we have before seen, contracts, and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division; and, incidental to this, to apportion their property and to direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property must be made at the time of the division of, or change in, the corporation, since otherwise the old corporation becomes, under the rule just before stated, the sole owner of the property, and hence, cannot be deprived of it by a subsequent act of the legislature. But in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it

is inconsistent with the necessary supremacy of the legislature over all its corporate and incorporate bodies, divisions, and parts, and with several well-considered adjudications.

72 See also Springwells *vs.* Wayne Co. Treas., 58 Mich., 240, which impliedly recognizes this rule. See also Perrizo *vs.* Kessler, *supra* where Morse, C. J., explicitly concedes this power to the legislature in a school district case.

Whatever we may think of the justice of this act (and we cannot say that the situation was not fully known and discussed by the legislature) we cannot doubt the legislative authority to change these districts and provide for the disposal of their property and payment of their debts, as was done in this case.

The law is said to fix the site of a school building. This is not usual, but we are not convinced that it is beyond the power of the legislature to locate its school houses, court houses, and almshouses. No authority is cited to the contrary, and without deciding the question we may say that the sites alluded to had already been located and one built upon by the districts. In the saying that these should be deemed to be respectively a school house site and the central school house for the new district, the legislature, if it had not the power to fix beyond revocation such sites, can easily be held to have made a provision which was directory merely, and whatever we may think of their power in the premises, no one would claim that it was designed to forbid future action by the board, and we might safely eliminate the provision if necessary to sustain the act in accordance with a common and well understood rule.

But it is said that some of the territory was left out of the new district, and that the legislature fixed definitely what should be done with it, and appointed the officers who should attach it to new districts.

If this opinion is correct upon the first point discussed, it can not be doubted that the legislature might itself have attached this territory to specific districts. This it did not do, but attempted to confide the subject to the township school inspectors. This was the board authorized to deal with such questions, and had been elected by the township for such purposes. This cannot be said to be an appointment by the legislature within the case of Moreland *vs.* Millen, 126 Mich., 382.

73 The further objection is made upon the ground that the officers were named by the legislature, and their terms fixed at one, two and three years respectively. We understand that four of these have been superseded by successors duly elected, presumably two still hold their offices, and if the legislature had not the power to appoint them, the district should have filled them under the general law.

We are of the opinion that the constitution refers to school districts as they existed under our previous constitution and laws, and that it was expected that they would be managed by local officers, and

therefore, that the rule laid down in Moreland *vs.* Millen applies as to officers.

The officers were named by the legislature for unnecessarily long terms, even if it be supposed that the appointments were intended to be provisional. Under the general law the offices might have been filled, and may be yet. We understand from counsel, though the record does not appear to so state, that only four of the respondents do not now hold under such appointment, if they are still acting as officers. The other two unlawfully hold the office, but we have no means of telling which ones of the six they are.

Perhaps this is not important, as the attack seems aimed at the legislature, rather than the appointees.

The other two points need little discussion. We have so often discussed titles to acts, that the law is pretty well understood, and we therefore content ourselves with saying that in our opinion this title does not indicate more than one purpose, which is to give school facilities to all of the territory mentioned, under changed conditions. Nor do we think the act broader than the title.

We have already shown that the obligation of contracts is not impaired. The districts did not hold this property under any contract with the State, but as a public agency.

The judgement of ouster should be affirmed as to such officers as now hold under the legislative appointment, if there be any thus holding.

As to others, if any, it will be reversed. Neither party will recover costs.

74 FRANK A. HOOKER.
R. M. MONTGOMERY.

Because of the decision in Moreland *v.* Millen, I concur in the result.

J. B. MOORE.

Mr. Justice Long did not sit.

The legislature of 1901 passed an act entitled:

"An act to incorporate the public schools of the village of Jerome, Hillsdale county, Michigan; define the boundaries thereof, provide for the election of trustees and fix their powers and duties, and provide for the distribution of the territory of the disorganized districts."

It was given immediate effect, and approved March 1st.

The district as organized by the act was formed from the major part of three districts then existing, and situated in the townships of Somerset and Moscow, in Hillsdale county.

Section 1 defines the boundaries of the district.

Section 2 provides for six trustees, naming them. They were to meet within twenty days after the act took effect and divide into three equal divisions; the first division to expire at the time of the

first annual school meeting, the second at the second annual meeting and the third at the third annual meeting. The terms were to be decided by lot. If any vacanc-es occurred in their number they were authorized to fill them by appointment.

Section three provides for the election of trustees upon the expiration of the terms of office of those who were appointed by the act.

Section 4, in addition to the powers imposed by the act, confers also upon the trustees all the powers and privileges conferred upon union and graded school districts by the general law, and the powers and duties of school inspectors are vested in said trustees, who are made *ex-officio* a board of school inspectors.

By section 7 all the lands, school houses, and sites, furniture, libraries, property and effects belonging to the several old school districts, were transferred to and declared to be the property of the schools established by the act; and all the debts and obligations of the three districts were imposed upon the new district.

Section 9 fixed the site of the school house to be one then owned and occupied by fractional school district No. 2, and made the buildings situated thereon the central school building of the public schools of the village of Jerome, to be used for academic and more advanced classes of scholars, as the board of trustees shall deem necessary.

Section 10 authorized the sale of all property of the old districts, and directed that the moneys received therefrom should be used in making improvements and additions to the central school building.

Section 11 directed the school inspectors of the township of Somerset to attach to their districts within the boundary of said township such parts of said districts as were not comprised in the territory of the new district.

This suit is instituted by the attorney general to test the validity of the above act. The sole question presented is its constitutionality. The court below held the act unconstitutional.

Four reasons are urged against the constitutionality of this act:

(1.) That it deprives the school district of local self-government.

(2.) That the title to the act embraces more than one object.

(3.) That the body embraces objects not covered by the title.

(4.) That it impairs the obligation of contracts.

75 A school district is a municipal corporation. School Dist. No. 4 etc., *vs.* Gage, 39 Mich., 484; Seeley *vs.* Board of Education, 39 *id.*, 486. See also Stuart *et al. vs.* School Dist. No. 1, etc., 30 *id.* 69.

The legislature has no more right to interfere with local self-government therein than it has to interfere with the local self-government of cities, villages and townships. The constitution gives these corporations the same right to control their local affairs that it gives to other municipal corporations. This act does not pretend to appoint these six trustees as provisional officers, appointed for the sole purpose of launching the corporation into existence and providing

the inhabitants thereof with the right to then assume the reins of government and select their own officers. If the legislature could appoint these trustees for one and two years, it could as well appoint them for ten or more. This provision of the act is, therefore, clearly unconstitutional. Moreland *vs.* Millen, 85 N. W. 882.

This act not only deprives the inhabitants of this district of the right to choose their own officers, but it also deprives them of the right to locate their school site. It takes away all the property from the old districts and transfers it to the new, thereby depriving the inhabitants of the old districts, living in the territory not included within the new, of all interest in the property to which they have contributed. The act also authorizes the trustees appointed by the legislature, to sell all of the buildings and sites of the old districts, and to use the money in repairing, improving and adding to the central school building located upon the site fixed by the act. Besides, it makes the trustees school inspectors, who are constitutional officers.

If the only objection of this act was the appointment by the legislature of permanent officers, it might possibly be sustained under Moreland *vs.* Millen, *supra*, and an election ordered to choose trustees. But the act wipes out nearly every vestige of local self-government. The inhabitants are given no voice in the election of officers, in the choice of a school site, in the disposal of their property, or the uses to which the proceeds of the sale shall be put. All the important powers incident to these corporations and essential to their local management, are absolutely taken away. If this
76 act be sustained, it must follow that the legislature can absolutely deprive the inhabitants of these school districts of the right to locate their sites and to control their property for school purposes in such manner as they may deem for their best interests. It must follow that the legislature can make contracts for every school district in the State with teachers; can fix the amount each district shall raise by tax and can determine how much each district must spend in erecting a school house. If we understand the position of the learned counsel for the respondent, they insist that the legislature possesses just this power, and they compare the position of the schools to boards of health established by the legislature. Schools are constitutional municipalities, *i. e.*, they are provided for in the constitution, while boards of health are not.

The provisions of the constitution of 1835 were substantially the same in regard to primary schools as are those of the constitution of 1850. The provision relied upon to confer this power exclusively upon the legislature, is section 4 of article 13, requiring the legislature "to provide for and establish a system of primary schools, where by a school shall be kept without charge for tuition at least three months in each year in every school district in the State."

So the constitution requires the legislature "to provide for the incorporation and organization of cities and villages." What difference is there between the power "to provide for and establish," and the

power "to incorporate and organize"? Does one confer the right of local self-government and the other take it away? The constitution contains not a sentence conferring greater power upon the legislature to interfere with local self-government of school districts than it does with that of the cities and villages. It requires them to provide for the organization of both. Local self-government was exercised by both under the old constitution, and was exercised when the new constitution was adopted, and has been exercised ever since. The legislature has attempted to interfere in various ways in the local self-government of cities and villages, and these acts have been declared unconstitutional. This is *is* the first time it has been urged in this court that the exclusive control over school corporations is vested in the legislature to the entire
77 exclusion of local self-government. Broader language may have been used in some of the decisions than the facts called for, but no case has before been presented involving the destruction of local self-government in these municipalities. The language quoted and relied upon to sustain this doctrine from Perrizo *vs.* Kessler, 93 Mich., 283, is used where the act organized a whole township into a single school district, and required a petition to be signed by a majority of the electors to be filed with the township clerk fifteen days before the annual town meeting, giving notice that at such meeting the officers for such organized school district will be chosen. The question was whether the township board was a constitutional tribunal to determine whether the requisite number of qualified electors had signed the petition. The same opinion (at page 284) speaks of school districts as municipal corporations, saying:

"The history of our State is full of such legislation in the enlargement of the boundaries of municipalities, and the right to legislate cannot now be questioned."

The boundaries of cities, villages, townships, and school districts have been fixed by the legislature. No one was ever organized by an act of the legislature without fixing the boundaries.

In Pingree *vs.* Board of Education, 99 Mich., 404, the sole question was the constitutionality of an act making the mayor *ex-officio* a member of the board of education of the city of Detroit, with certain veto powers. In that case the territory of the school district was the same as the territory of the city of Detroit. The people elected the mayor, and when nominated and elected the people would understand that they were voting for a member of the school board.

While it is true that the qualifications for voters in a school district are somewhat different from those in the election of a mayor, yet the power so conferred upon an elective officer is not in conflict with the right of local self-government. If, however, it can be held that it is, and the language there used can be so construed as to hold that there is no such thing as local self-government for the school districts of this State, the doctrine ought, in my judgment, to

be limited to the facts of that particular case. Of course it was entrusted by the constitution to the legislature to provide for a primary school system, just as the power was confided to the legislature to provide for the organization of cities and villages.

78 Section 14, article 15, of the constitution, requires judicial officers of cities and villages to be elected, but that all other officers shall be elected or appointed, as the legislature may direct. We have distinctly held that this does not mean appointment by the legislature, but by the local authorities.

Belles *vs.* Burr, 76 Mich., 1, is in accord with the doctrine I now maintain, for it holds that the authority granted by the constitution to the legislature to establish school systems, confers the power to prescribe what officers shall be chosen to conduct the affairs of the districts, to define their powers and duties, their terms of office, and how and by whom they should be chosen. This authority is no other or different from that conferred upon the legislature over cities and villages. Under both the constitutions of Michigan no such power as is now claimed has ever before been exercised, nor has it ever been claimed that the people had no right of local self-government over the district schools. On the contrary, the people have been left in control of their local affairs in school districts as well as in other municipalities.

I think this is a practical construction of this provision of the constitution against the contention now made. The act, in my judgement, cannot be sustained, and should be held void.

Under this disposition of the case, it is unnecessary to discuss the other questions.

C. B. GRANT.

(Endorsed:) Filed Nov. 18, 1902. Chas. C. Hopkins, clerk.

79 *Motion.*

STATE OF MICHIGAN:

The Supreme Court.

ATTORNEY GENERAL *ex Rel.* L. E. KIES ET AL., Relators,
vs.
THOMAS J. LOWREY ET AL., Respondents.

And now comes said respondents, by F. H. Stone and W. J. Sampson their attorneys, and moves the court to advance said cause on the docket, and set same down for hearing at as early a day as possible, for the following reasons:—

1.

Said cause involves, as the sole question at issue, the constitutionality of act No. 315, Local Acts of 1901.

2.

Said act No. 315 creates a new school district from portions of four old districts, and also provides for the distribution of the extra territory included in the old districts but excluded from the new.

3.

Respondents are the officers of such new district, and if said act is held constitutional by this court, it is their duty to make the necessary arrangements for the annual school meeting to be held on the first Monday in July next, and to make arrangements for carrying on a school in said district during the coming school year.

4.

If said act be held unconstitutional then it will be necessary for the officers of the old districts disorganized by said act to make arrangements for the holding of the annual school meeting in such old districts, and for the carrying on of the districts schools in their respective districts.

80

5.

If the hearing of this cause be put off until the same is reached in the regular call a determination cannot be had until too late for the making of the necessary arrangements for their school meetings, or for carrying on of the schools.

6.

It therefore appears that this cause is one the early determination of which is of great importance not only to all the citizens residing in the territory involved, but to the public at large who are vitally interested in having public schools carried on without interruption.

This motion is based upon the records and files in the above entitled cause.

(Signed) F. H. STONE,
W. J. SAMPSON,
Attorneys for Respondents.

Because of the great public importance of an early determination of the issue involved in the above entitled cause, as set forth in the above motion, we ask that the same be granted, and the cause heard as soon as possible by this court.

(Signed) LYON & McINTYRE,
Attorneys for Relators.

It is hereby stipulated and agreed that the above motion be brought on for hearing at the opening of court on Tuesday, June 3, 1902, or as soon thereafter as counsel can be heard.

Dated, May 29, 1902.

(Signed) LYON & McINTYRE,
Attorneys for Relators.

(Signed) F. H. STONE AND
W. J. SAMPSON,
Attorneys for Respondents.

(Endorsed:) Filed May 29, 1902. Chas. C. Hopkins, clerk.

81 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the third day of June in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Frank A. Hooker, chief justice. Joseph B. Moore, Claudius B. Grant, Robert M. Montgomery, associate justices.

ATTORNEY GENERAL *ex Rel.* L. E. KIES ET AL.
vs.
T. J. LOWREY ET AL. } No. 19369.

In this cause a motion is entered to advance the same for hearing, and the court having considered the same, ordered that the cause stand for hearing to follow the cases now on the call.

82 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the fourth day of June in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Frank A. Hooker, chief justice. Joseph B. Moore, Claudius B. Grant, Robert M. Montgomery, associate justices.

ATTORNEY GENERAL *ex Rel.* L. E. KIES ET AL., Relators,
vs.
T. J. LOWREY ET AL., Respondents and Appellants. } No. 19369.

This cause coming on to be heard is argued by Mr. Lyon for relators and by Mr. W. J. Sampson for respondents and submitted.

83 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the eighteenth day of November in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Frank A. Hooker, chief justice. Joseph B. Moore, Claudius B. Grant, Robert M. Montgomery, associate justices.

ATTORNEY GENERAL *ex Rel.* L. E. KIES ET AL.
vs.
T. J. LOWREY ET AL. } No. 19369.

In this cause an opinion is filed in accordance with which an order will be hereafter entered.

84 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the third day of February in the year of our Lord one thousand nine hundred and three.

Present: The Honorable Frank A. Hooker, chief justice. Joseph B. Moore, William L. Carpenter, Claudius B. Grant, Robert M. Montgomery, associate justice.

ATTORNEY GENERAL *ex Rel.* L. E. KIES ET AL.,
Relators,
vs.
T. J. LOWREY ET AL., Respondents. } No. 19369.

In this cause a motion for re-hearing is duly submitted.

85 STATE OF MICHIGAN:

Supreme Court.

THE ATTORNEY GENERAL, Relator,
vs.
T. J. LOWERY ET AL., Repondents.

Motion for Re-hearing.

The relator and appellee in the above entitled cause moves the court to grant a rehearing of said cause because consideration of the opinions filed therein shows:

First. That the decision of the court rests upon certain principles of law not argued by counsel, but involved in the case made as now shown by the decision of the court.

The court having determined that the power existed in the legislature to lessen the political privileges enjoyed by the school district, it becomes necessary to inquire whether the district has been divested of property without due process of law; this not only under our State constitution, but under the fourteenth amendment
86 to the Federal Constitution. Assuming that the authorities cited by the court give to the legislature the power to apportion the property between the portions of the district divided, this power must be exercised by the legislature in like manner as it

would be executed by the courts if brought within the judicial discretion. It having been determined as it has been, by a number of decisions, that municipal corporations are protected in their right to property lawfully acquired for local purposes the legislature must in the exercise of its superior power of political control, recognize the civil rights of the municipality and by its processes secure justice to the individual. The school district was recognized by this court in

Maynard *vs.* Woodard, 36 Mich., 423,

as a corporation entitled to receive a bequest for library purposes though the library itself was recognized as outside of the proper purposes of the school, though not foreign to educational interests. In view of the language of section 7 of the act under consideration such bequests might be transferred from the locality in which the testator was interested to one in which he had no interest at all, and it is not certain but that the effect of this decision would affect scores if not hundreds of districts in this way, and permit the diversion of funds lawfully held in trust by the district to territory foreign to the original purpose.

The direct transfer of the funds of the old district by the express terms of the law without saving to the portions not included in the new district any equitable interest therein or any share thereof, goes much beyond any adjudicated case which we have been able to find. Judge Cooley in his work on Constitutional Limitations states the rule as follows: "When a municipal division is changed in its boundaries, two or more consolidated in one, it is conceded that the legislature possesses the power to make such disposition of the corporate property as natural equity would require in view of the altered condition of things." In the Dartmouth College case, the statement of like power is as follows: "Securing however the
87 property for the use of those for whom and at whose expense it was purchased."

It cannot be said that the legislature in this act compensated the portions of the district school cut off from future enjoyment of the property for the loss incident to the change, for they are left to be assigned at the pleasure of a board of township school inspectors. They may be used to lighten the burden of taxation in some district seeking to accumulate a property such as was already owned by the municipality of which they had theretofore been a part and in the accumulation of which the taxes paid by them and conceivable gifts of labor and money had been a material factor. As Judge Cooley says in Constitutional Limitations page 237, "A distinction should be drawn between the political rights conferred on corporations and which are not vested rights in any sense implying constitutional protection and such rights in property as the corporation acquires, and which are protected by the same reasons which shield similar rights in individuals." The protection is analagous to that which pertains to the constitutional entity. It is subject to regulation and modification but not to abolition. In

like manner we say that even though the legislative power may in this case be exercised with respect to property as an incident to the political changes involved, it must be under what is ordinarily understood to be judicial process, that is the general rules that govern society in reference to the rights to property.

Varden *vs.* Mount, 78 Kentucky 86.

We contend that the distribution of benefits and of losses must be complete in the legislative act which changes the political conditions. This in view of what we have before said, presents a new question upon which argument should be permitted.

Second. The court failed to apply the principle of law protecting civil rights of municipalities to the facts of the case. The assent of Judge Moore was based upon the authority of

Moreland *vs.* Millan, 126 Mich., 381.

A careful examination of the case of Moreland *vs.* Millan
88 shows no application of the rule protecting property of a municipality, the question involved being merely political and involving two agencies of the same city.

With due respect to the court, we believe that the political question so fully argued, and which was believed by counsel to be conclusive upon the questions involved, carried the court in its determination to a point where the civil rights were not sufficiently considered. In the discussion of this matter in the briefs submitted on the hearing, stress was laid upon the implied contract included in the acts providing for the incorporation; but even though the finding of the court was correct or is conclusive upon this proposition, it by no means follows that the act should be sustained. It will be conceded we think, that the power exercised by the legislature is somewhat anomalous in view of the structure of our Government as repeatedly emphasized by the court, and we submit that in view of the great importance of the questions involved, that the phase pertaining to the civil rights of the people of the territory involved ought to be further discussed.

LYON & McINTYRE,
Attorneys for Relators,
T. E. BARKWORTH,
Of Counsel for Relators.

89 STATE OF MICHIGAN:

Supreme Court.

THE ATTORNEY GENERAL *ex Rel.*, Relator,
vs.
T. J. LOWERY ET AL., Respondents.

Objections to Rehearing.

The relators ask to have this case reopened and further argument permitted, for the reason that "the principles of law" on which the decision is based were "not argued by counsel."

We are at something of a loss to understand just what our esteemed brother, Barkworth, means by this statement. Were it not for his well known modesty we might get the impression that he wished to intimate that as the case had not been discussed by himself
90 it therefore had not been "argued." However, we will very briefly give our reasons in opposition to this motion.

As we understand this motion, it asks a rehearing and reversal because the act in question violates both the State and Federal Constitutions by the provision in section 7 of the act which gives to the new district all the property of the disarranged district and makes the new district liable for all the debts and obligations of the old. If we read the argument of Mr. Barkworth aright as set forth in this motion, he concedes that the legislature had the *power* to deal with the property belonging to the divided districts, but insists that this power can only be exercised by the legislature by making a *just and equitable distribution of such property.* Concede, for the sake of the argument only, that this is true and what does it avail relators? Where is the inequity in giving all the property to the new district *and compelling the new district to assume all of the debts and obligations of the old?* It is to be regretted that he did not call the attention of the court to that part of the record which he claims shows that the distribution made by the legislature was either unjust or inequitable.

But we insist that this matter was fully discussed by counsel and carefully considered by the court on the former hearing and that the conclusion then reached was correct and should not be disturbed. The able counsel who then had the cause of relators in charge took up the discussion of this identical question at about the middle of page 13 of their brief and continued it to the bottom of page 18. Our associate and ourselves both gave our views
91 at some length in our printed briefs. Considerable time was given it on the oral argument, and while it may not have been "argued by counsel" we succeeded in attracting the attention of the court to the subject to the extent that in the published report of the case, volume 92, N. W. Rep., page 289, more space is devoted

to the reasoning on this point by Judge Hooker than to any other. We can see no reason in this motion for changing the conclusion then reached and are content to submit the matter on the discussion of this point in our former briefs.

We also think that the lapse of time should be considered as against re-opening this case. It was argued in June, 1902, and carefully and critically considered by the court until decided, November 18, 1902. After that decision, believing that they were finally to be left to the peaceful discharge of the duties forced upon them by the legislature, respondents went ahead, contracted with teachers and have been striving, to the best of their ability, to provide the residents of that district with a good school. Now, more than two months after the decision, new counsel for the relators asks for a rehearing, for the reason, as we read the motion, that this court reached a wrong conclusion upon a point fully discussed and considered. We respectfully, but very earnestly urge that this should not be permitted.

FRED H. STONE,
W. J. SAMPSON,
Attorneys for Respondents.

92 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the twenty-third day of March in the year of our Lord one thousand nine hundred and three.

Present: The Honorable Frank A. Hooker, chief justice. Joseph B. Moore, William L. Carpenter, Robert M. Montgomery, associate justices.

ATTORNEY GENERAL *ex Rel.* L. E. KIES ET AL., Relators,
vs.
T. J. LOWREY ET AL., Respondents and Appellants. } No. 19369.

The motion for a re-hearing heretofore submitted herein having been duly considered by the court, is hereby denied, with costs to the respondents.

93 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the twelfth day of April in the year of our Lord one thousand nine hundred and four.

Present: The Honorable Joseph B. Moore, chief justice. William L. Carpenter, Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, associate justices.

THE ATTORNEY GENERAL *ex Rel.* L. E. KIES, W. E. Alley, J. S. Strong, and Stephen McCleary, Relator-,
vs.
THOMAS J. LOWREY, H. S. WALWORTH, C. H. MANZER, C. M. Bross, W. L. Bibbins, and Jay Chandler, Respondents and Appellants. } No. 19369.

The record and proceedings in this cause having been removed to this court by writ of error, issued to the circuit court for the county of Hillsdale, and the same, and the matters in error assigned, having been seen and inspected and duly considered by the court, it is now ordered and adjudged by the court that the judgment of ouster, in the court below, as to such officers as now hold under legislative appointment, be and the same is hereby in all things affirmed.

It is further ordered and adjudged that, as to all other respondents, the said judgment of ouster, is hereby reversed and vacated.

And it is further ordered and adjudged that no costs be awarded to either party herein.

It is further ordered that this judgment be entered *nunc pro tunc* as of November 18th, 1903, the day the opinion of this court was filed herein.

94 *Bond.*

Know all men by these presents, that we, L. E. Kies, W. E. Alley, J. B. Strong, and Stephen McCleary as principals and Forest L. Weaver and Reuben A. Randolph as sureties are held and firmly bound unto T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler in the full and just sum of five hundred dollars, to be paid to the said T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler, and their certain attorney, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of April, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a session of the supreme court of the State of Michigan in a suit depending in said court, between The Attorney General of the State of Michigan, upon the relation of said L. E. Kies, W. E. Alley, J. B. Strong and Stephen McCleary against the said T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler as respondents, a final judgment was rendered against the said attorney general of the State of Michigan, upon the relation of the above named relators, and the said above named relators having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judg-

ment in the aforesaid suit, and a citation directed to the said T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof.

Now, the condition of the above obligation is such, that if
95 the said attorney general upon the relation of L. E. Kies, W. E. Alley, J. B. Strong, and Stephen McCleary shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

L. E. KIES. [SEAL.]
STEPHEN McCLEARY. [SEAL.]
W. E. ALLEY. [SEAL.]
F. L. WEAVER. [SEAL.]
J. B. STRONG. [SEAL.]
R. A. RANDOLPH. [SEAL.]

Sealed and delivered in the presence of
JOHN G. MERCER.
ADELL ALLEY.

Approved by—
JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

STATE OF MICHIGAN, } ss:
County of Hillsdale }

L. E. Kies, W. E. Alley, J. B. Strong, and Stephen McCleary, as principals and Forest L. Weaver and Reuben A. Randolph as sureties, being first duly sworn, depose and say and each for himself says, that he is worth the sum of five hundred dollars, the penalty mentioned in the within bond, in unincumbered property liable to execution, over and above all liabilities and exemptions.

L. E. KIES.
STEPHEN McCLEARY.
W. E. ALLEY.
J. B. STRONG.
F. L. WEAVER.
R. A. RANDOLPH.

Subscribed and sworn to before me this 20th day of April A. D. 1904.

JOHN G. MERCER.

My commission expires March 19, 1905.

(Endorsed:) Filed April 25, 1904 Chas. C. Hopkins, clerk supreme court.

96 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of Michigan, Lansing.]

To Thomas J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins, and Jay Chandler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Michigan wherein The Attorney General of the State of Michigan upon the relation of L. E. Kies, W. E. Alley, J. B. Strong and Stephen McCleary are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph B. Moore, chief justice of the supreme court of the State of Michigan, this fifteenth day of April, in the year of our Lord one thousand nine hundred and four.

JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

96½ On this 23rd day of April, in the year of our Lord one thousand nine hundred and four, personally appeared O. P. Eggleston before me, the subscriber, a notary public and makes oath that he delivered a true copy of the within citation to T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler within named, at the township of Somerset, county of Hillsdale and State of Michigan, and at the same time showed them the original, on the 22nd day of April, 1904.

O. P. EGGLESTON.

Sworn to and subscribed the 23rd day of April, A. D. 1904.

[Seal of Fred. H. Stone, Notary Public, Hillsdale Co., Mich.]

FRED. H. STONE,
Notary Public.

Commission expires February 19th, 1907.

97 The Supreme Court of the United States.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN upon the Relation of L. E. Kies, W. E. Alley, J. B. Strong, and Stephen McCleary, Relator and Appellant,
vs.
T. J. LOWREY, H. S. WALWORTH C. H. MANZER, C. M. BROSS, W. L. Bibbins, and Jay Chandler, Respondents and Appellees.

In the matter of the petition of Charles A. Blair, attorney general of the State of Michigan, appellant.

Assignment of Errors.

Afterwards and to wit on Friday, the 15th day of April, A. D. 1904, at the October term of the year 1903, of the Supreme Court of the United States at the Capitol in the city of Washington and District of Columbia, comes the said relator and appellant, by F. A. Lyon, his attorney, and says that in the record and proceedings in the above entitled cause in the supreme court of the State of Michigan, the court below, there is manifest error in this, to-wit:

I.

The supreme court of the State of Michigan held that act No. 315 of the local acts of the State of Michigan for the year 1901 entitled "An act to incorporate the public schools of the village of Jerome, Hillsdale county, Michigan, define the boundaries thereof, provide for the election of trustees, and fix their powers and duties, and provide for the distribution of the territory of the disorganized districts," the statute in question in this suit was not void as depriving the school district organized by said act of the right to local self-government.

II.

It was error for the supreme court of the State of Michigan to hold that said act was valid and not in violation of the constitutional right of said district to self-government.

98 III.

It was error for the supreme court to hold that the Constitution of the United States and the constitution of the State of Michigan did not guarantee to said district and other municipalities in the State of Michigan the right to local self-government.

IV.

It was error for the supreme court of the State of Michigan to hold that said act as passed did not impair the obligation of con-

tracts within the meaning of the Constitution of the United States and the constitution of the State of Michigan.

V.

The supreme court of the State of Michigan erred in holding that said act was not void as taking away from the old school districts without the consent of said old school districts, or of the inhabitants, tax-payers and voters thereof without just compensation and without due process of law.

VI.

It was error for the supreme court of the State of Michigan to hold that said act was not void as in violation of article I, section 10, subdivision I, of the Constitution of the United States, also in violation of the provisions of article IV, section 43, of the constitution of the State of Michigan.

VII.

The supreme court of the State of Michigan erred in holding that said act was not void as in violation of the fourteenth amendment to the Constitution of the United States as depriving the old school districts and the inhabitants, and tax-payers thereof, of their property without due compensation and due process of law.

VIII.

The supreme court of the State of Michigan erred in holding that said act was a valid and constitutional exercise of legislative power on the part of the legislature of the State of Michigan.

IX.

The supreme court of the State of Michigan erred in hold-
99 ing that said act was not void as in violation of the Constitution of the United States.

Wherefore the said Charles A. Blair, attorney general of the State of Michigan, appellant, prays that the decision of the supreme court of the State of Michigan be reviewed, re-examined and reversed.

F. A. LYON,
Attorney for Appellant.

Business address: Hillsdale, Mich.

100 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Michigan, before you, or some of you, being the

highest court of law or equity of the said State in which a decision could be had in the said suit between The Attorney General of the State of Michigan upon the relation — L. E. Kies, W. E. Alley, J. B. Strong and Stephen McCleary, relators, and Thomas J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross, W. L. Bibbins and Jay Chandler, respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
101 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Attorney General of the State of Michigan upon the relation of L. E. Kies, W. E. Alley, J. B. Strong and Stephen McCleary, relators, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifteenth day of April, in the year of our Lord one thousand nine hundred and four.

{ Seal of the U. S. Circuit Court, Western District of Mich., Southern Division. }

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States for the Western District of Michigan.

Allowed by

JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

101½ [Endorsed:] Filed April 16, 1904, Chas. C. Hopkins, clerk

To the Supreme Court of the United States:

The execution of the within writ of error appears by transcript of record hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

April 30, 1904.

102 Supreme Court of the State of Michigan.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN upon the Relation of L. E. Kies, W. E. Alley, J. B. Strong, and Stephen McCleary, Relator and Plaintiff in Error,

vs.

T. J. LOWREY, H. S. WALWORTH, C. H. MANZER, C. M. BROSS, W. L. Bibbins, and Jay Chandler, Respondents and Defendants in Error.

STATE OF MICHIGAN, } ss:
In Supreme Court, }

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in above entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, the citation with proof of service of copies thereof on adverse parties, and a copy of the bond to said adverse parties, duly approved, together with the assignments of error in the Supreme Court of the United States; that the petition for the allowance of the writ of error, with attached Exhibits, A. B. C. D. E. F. G. H. I. J. and K. constitute the entire record of the case in this court, up to the time of the filing of the opinion of this court in the cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing this thirtieth day of April in the year of our Lord one thousand nine hundred and four.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 19,330. Michigan supreme court. Term No. 248. The Attorney General of the State of Michigan upon the relation of L. E. Kies *et al.*, plaintiffs in error, *vs.* Thomas J. Lowrey, H. S. Walworth, C. H. Manzer, *et al.* Filed May 9th, 1904. File No. 19,330.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 6 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. ~~248~~. 21.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN UPON THE RELATION OF L. E. KIES ET AL., *Plaintiffs in Error.*

vs.

THOMAS J. LOWREY, H. S. WALWORTH, C. H. MANZER ET AL.

BRIEF FOR PLAINTIFFS IN ERROR.

FRANK A. LYON,
Attorney for Plaintiffs.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 248.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN UPON THE RELATION OF L. E. KIES ET AL., *Plaintiffs in Error.*

vs.

THOMAS J. LOWREY, H. S. WALWORTH, C. H. MANZER ET AL.

BRIEF FOR PLAINTIFFS IN ERROR.

FRANK A. LYON,
Attorney for Plaintiffs.

STATEMENT OF FACTS.

By the Constitution of Michigan, adopted in 1850, it is provided:

"The Legislature shall, within five years from the adoption of this Constitution, provide for and establish a system of primary schools, whereby a school shall be kept without charge for tuition, at least three months in each year, *in every school district* in the State; and all instruction in said schools shall be conducted in the English language." [Art. 13, Sec. 4.]

In accordance with the terms of this constitutional provision, the Legislature passed a law establishing a system of primary and graded schools throughout the State of Michigan, which law from time to time has been modified and amended and superseded by other acts of the Legislature. Finally, in the year 1881, the Legislature passed an act entitled "An Act to Revise and Consolidate the Laws Relating to Public Instruction and Primary Schools, and to Repeal all Statutes and Acts Contravening the Provisions of this Act." (Act 164 of the Public Acts of Michigan for the year 1881.)

In Chapter II. of this act it is provided for the "Formation, Alteration, Meetings and Powers of Districts."

Section 1 of this chapter provides that "The Township Board of School Inspectors shall divide the township into such number of school districts as may from time to time be necessary, and they may regulate and alter the boundaries of the same as circumstances shall render proper."

Section 4 of this chapter provides that "Whenever it shall be necessary or convenient to form a district from two or more adjoining townships, the inspectors, or a majority of them, of each of such adjoining townships may form such district, to be designated as a fractional district."

Section 8 of this chapter provides that whenever the Board of School Inspectors shall contemplate an alteration of the boundaries of a district, the Township Clerk shall call a meeting of the inspectors for that purpose, and that whenever the Board of School Inspectors of more than one township meet, this meeting shall be called by the Township Clerks as therein provided.

Section 9 provides that the inspectors may, in their discretion, detach the property of any person or persons from one district and attach the same to another, under certain restrictions pointed out therein.

Section 12 of this chapter provides that, when the Board of School Inspectors shall divide the territory of one or more districts possessed of a school house or entitled to other property, this school property shall be divided between the parts of the original district equitably, and Section 13 provides the manner of ascertaining the equitable share which shall belong to each part of such district or districts.

Section 7 of this chapter provides as follows: "Every school district organized in pursuance of this chapter, or which has been organized and continued under any previous law of the State or Territory of Michigan, *shall be a body corporate and shall possess the usual powers of a corporation for public purposes,* by the name and style of 'School District Number ——— (such number as shall be designated in the formation thereof by the inspectors) of ———' (the name of the township or townships in which the district is situated), and in that name *shall be capable of suing and being sued, of contracting and being contracted with, and of holding such real and personal estate as is authorized to be purchased by the provisions of law, and of selling the same.*"

Section 20 of this chapter provides, among other things, as follows: "The qualified voters in any school district, when lawfully assembled at the first and at each annual meeting, or at any adjournment thereof, or at any special meeting lawfully called, except as hereinafter provided, shall have power:

* * * * * * * * * *

Third—To elect district officers as hereinafter provided;

Fourth—To designate, as hereinafter provided, a site or such number of sites as may be desired for school houses, and to change the same when necessary;

Fifth—To direct the purchasing or leasing of a site or sites, lawfully determined upon, the building, hiring or purchasing of a school house or houses, or the enlarging of a site or sites previously established.

Sixth—To vote such tax as the meeting shall deem sufficient, to

purchase or lease a site or sites, or to build, hire, or purchase a school house or houses; * * *

Seventh—To impose such tax as shall be necessary to keep their school house or houses in repair, and to provide the necessary appendages and school apparatus, and in districts having district libraries, for the support of the same, and to pay or discharge any debts or liabilities of the district lawfully incurred; * *

Eighth—To authorize and direct the sale of any school house, site, building or other property belonging to the district, when same shall be no longer needed for the use of the district.

* * * * * * * * * *

Chapter III. of this act provides for the election of a district board and officers, and provides for their powers and authority.

Section 8 of this chapter provides: "The district board shall purchase or lease in the corporate name of the district such sites for school houses as shall have been lawfully designated, and shall build, hire, or purchase such school houses as may be necessary, out of the fund provided for that purpose, and make sale of any site or other property of the district when lawfully directed by the qualified voters.

* * * * * * * * * *

Section 14 of this chapter provides that "The district board shall have the care and custody of the school house and other property of the district, except so far as the same shall, by vote of the district, be specially confided to the custody of the director."

Section 1 of Chapter VIII. of this act provides that "The qualified voters of any school district, when lawfully assembled, may designate by a vote of two-thirds of those present such number of sites as may be desired for school houses, and may change the same by a similar vote at any annual meeting."

This chapter also provides that when any site can not be established by such inhabitants, the school inspectors of the township or townships in which the district is situated shall determine where such site shall be, and points out the proceedings to be taken to condemn such sites and acquire the title thereto. And Section 9 of this chapter provides that, after these condemnation proceedings shall have been taken, the title in fee of such real estate shall forever

thereafter be vested in such school district and its successors and assigns.

Chapter X. of this act provides for the organization of graded school districts.

Section 1 of this chapter provides: "Any school district containing more than one hundred children between the ages of five and twenty years may, by a two-thirds vote of the qualified voters present any any annual or special meeting, organize as a graded school district," after which certain trustees are to be elected.

Section 3 of this chapter provides the powers and duties of the trustees of these graded school districts.

Section 4 provides that "No alteration shall be made in the boundaries of any graded school district without the consent of a majority of the trustees of said district."

Section 5 provides as follows: "Whenever two or more contiguous districts having together more than one hundred children between the ages of five and twenty years, after having published in the notices of the annual meetings of each district the intention to take such action, shall severally, by a vote of two-thirds of the qualified voters attending the annual meetings in said districts, determine to unite for the purpose of establishing a graded school district under the provisions of this chapter, the school inspectors of the township or townships in which such districts may be situated shall, on being properly notified of such vote, proceed to unite such districts."

Under and by virtue of the provision of this school law, four school districts were organized in the Townships of Somerset and Moscow, County of Hillsdale, State of Michigan, one district being known as "Fraction District No. II. of the Townships of Somerset and Moscow," in which the Village of Jerome, in said Hillsdale County, was situated; one district known as "District Number III. of the Township of Somerset," one district known as "District Number VII. of the Township of Somerset," and one district known as "District Number VIII. of the Townships of Somerset and Moscow." [Rec., pp. 5 and 7.]

In the year 1901 the Legislature of Michigan passed an act known

as "Act Number 315 of the Local Acts of the State of Michigan for the year 1901," entitled "An Act to Incorporate the Public Schools of the Village of Jerome, Hillsdale County, Michigan; define the boundaries thereof, provide for the election of trustees and fix their powers and duties, and provide for the distribution of the territory of the disorganized districts." ["Exhibit A," Rec., pp. 5 to 8.]

By the terms of this act, the aforesaid school district known as "Fractional School District Number II. of the Townships of Somerset and Moscow," in which the Village of Jerome was situated, and certain portions of the other districts, were specifically set off and incorporated into one school district, to be known as "The Public Schools of the Village of Jerome." This act also appointed a board of trustees, consisting of Trustees T. J. Lowrey, H. S. Walworth, C. H. Manzer, C. M. Bross and W. L. Bibbins, residents of said Fractional School District Number II. of the Townships of Somerset and Moscow, in which the Village of Jerome is situated, and Jay Chandler, of the school district known as "District Number VII. of the Township of Somerset," and providing that these should continue in office until their successors should be elected and qualified, *as provided for in said act.*

Section 2 of said act also provided that said trustees should meet within twenty (20) days after said act should take effect, and by lot divide into three equal divisions the term of office of each, the first division to expire at the time of the first annual school meeting, the second at the second annual meeting, and the third at the third annual meeting. If any vacancies occurred in their number, they were authorized to fill them by appointment.

Section 3 provides for the election of trustees upon the expiration of the terms of office of those appointed by the act.

Section 4, in addition to the powers imposed by the act, confers upon these trustees all the powers and privileges conferred upon union and graded school districts by the general law; the powers and duties of school inspectors are vested in said trustees, who are made *ex-officio* a board of school inspectors.

By Section 7, *all the lands, school houses and sites, furniture, libraries, property and effects belonging to the several school districts were transferred to and declared to be the property of the schools established by the act, and all debts and obligations of the three districts were imposed upon the new district.*

Section 9 *fixed the site of the school house to be the one then*

owned and occupied by Fractional School District Number II., in which the Village of Jerome was situated, and made the building situate thereon the Central School Building of the Public Schools of the Village of Jerome, to be used for the academic and more advanced classes of scholars, and such other classes of scholars as the Board of Trustees should deem necessary.

Section 10 authorized the sale by the Board of Trustees, *as constituted in Section 2 of this act,* either at private or public sale, all the property of the old districts, and directed that the moneys received therefrom should be used in making improvements and additions to the Central School Building, as established by the act.

Section 11 directed that the School Inspectors of the Township of Somerset should attach to districts either wholly or in part within the boundaries of said township such portions of said districts as were not comprised within the territory of the new district.

This suit is a proceeding in the nature of *quo warranto,* brought by the Attorney General of the State of Michigan against the persons appointed by said act as a Board of Trustees, for the purpose of testing the constitutionality and validity of this act. The suit was brought in the Circuit Court for the County of Hillsdale, which court held the act unconstitutional, and rendered a judgment of ouster against the respondents. ["Exhibit F," Rec., pp. 17 and 18.]

After the decision of the Circuit Court for the County of Hillsdale, declaring the act unconstitutional and void, the respondents, on behalf of said new school district, took the case by writ of error to the Supreme Court of the State of Michigan, where the judgment of the lower court was reversed, and the validity of this act sustained.

The relator contended that this act was unconstitutional and void for the following reasons,to-wit:

First—That this act deprives the district created thereby, as well as the old districts, of the right of local self-government.

Second—That the act in question was void within the provisions and meaning of the Constitution of the United States, which pro-

vides that no state shall pass a law impairing the obligation of contracts.

Third—That the act in question was void because it deprived the old school districts of their property without just compensation or due process of law, within the meaning of the *XIV.* amendment of the Constitution of the United States. [See the relator's replication filed in the Circuit Court for the County of Hillsdale, "Exhibit D," Rec., pp. 12 to 16 inclusive. See also relator's brief, filed in the Supreme Court of the State of Michigan, Rec., pp. 21 to 32 inclusive.]

The Supreme Court of the State of Michigan, in the majority opinion, written by Mr. Justice Hooker and concurred in by a majority of the Court, sustained the validity of this act, reversed the decision of the court below, and held:

First—That school districts in the State of Michigan are not municipal corporations; they, together with counties, townships, highway districts, etc., are mere governmental agencies and have no rights that can be called private, and that the property of these corporations is in no sense private property, but is public property, devoted to the purposes of the State for the general good. [Rec., pp. 44, 45 and 46.]

Second—That the transfer of the property of the old school districts by this act to the new district created by this act was not taking the property of these old districts without due process of law, and was not depriving them of their property; that the property belonged to the State, and was absolutely under the control of the State Legislature.

Third—That the appointment of the Board of Trustees by this act for definite terms was not such a violation of the principles of local self-government as rendered the act null and void.

Fourth—That the fixing of the school house site, the establishing of the central school building, and the directing as to the disposition of the property of thees districts, was not a violation of the right of local self-government guaranteed to these corporations.

Fifth—That the act did not impair the obligation of contracts. [Rec., pp. 44, 45, 46, 47, 48, 49.]

The relator brings the case to this Court by writ of error to review the decision of the Supreme Court of the State of Michigan, reversing the decision of the Circuit Court for the County of Hillsdale.

SPECIFICATIONS OF ERRORS RELIED UPON.

There are nine assignments of error, all of which are relied upon for the reversal of the decision of the Supreme Court of the State of Michigan.

First Assignment of Error.

The Supreme Court of the State of Michigan held that Act. No. 315 of the Local Acts of the State of Michigan for the year 1901, entitled "An Act to Incorporate the Public Schools of the Village of Jerome, Hillsdale County, Michigan, Define the Boundaries Thereof, Provide for the Election of Trustees and Fix their Powers and Duties, and Provide for the Distribution of the Territory of the Disorganized Districts," the statute in question in this suit, was not void as depriving the school district organized by said act of the right to local self-government.

Second Assignment of Error.

It was error for the Supreme Court of the State of Michigan to hold that said act was valid and not in violation of the constitutional rights of said district to self-government.

Third Assignment of Error.

It was error for the Supreme Court to hold that the Constitution of the United States and the Constitution of the State of Michigan did not guarantee to said district and other municipalities in the State of Michigan the right of local self-government.

Fourth Assignment of Error.

It was error for the Supreme Court of the State of Michigan to hold that said act as passed did not impair the obligation of contracts within the meaning of the Constitution of the United States and the Constitution of the State of Michigan.

Fifth Assignment of Error.

The Supreme Court of the State of Michigan erred in holding

that said act was not void as taking property away from the old school districts, or of the inhabitants, taxpayers and voters thereof, without just compensation and without due process of law.

Sixth Assignment of Error.

It was error for the Supreme Court of the State of Michigan to hold that said act was not void as in violation of Article I., Section 10, Subdivision 1, of the Constitution of the United States; also in violation of the provisions of Article IV., Section 43, of the Constitution of the State of Michigan.

Seventh Assignment of Error.

The Supreme Court of the State of Michigan erred in holding that said act was not void as in violation of the Fourteenth Amendment of the Constitution of the United States as depriving the old school districts and the inhabitants and taxpayers thereof of their property without just compensation and due process of law.

Eighth Assignment of Error.

The Supreme Court of the State of Michigan erred in holding that said act was a valid and constitutional exercise of legislative power on the part of the Legislature of the State of Michigan.

Ninth Assignment of Error.

The Supreme Court of the State of Michigan erred in holding that said act was not void as in violation of the Constitution of the United States. [Rec., pp. 64 and 65.]

BRIEF AND ARGUMENT.

The only question involved in this case is the constitutionality and validity of the act of the Michigan Legislature in question. Does that act contravene in any way the provisions of the Federal Constitution?

In discussing the questions involved in this case, we shall not take up the different assignments of error in their order, for the reason that the questions can better be considered by grouping them in a different manner. Our contention is that this statute is void as contravening at least three different provisions of the Federal Constitution:

First—Section 4, Article IV., which provides: "The United States shall guarantee to every State in this Union a republican form of government."

Second—Section 10, Article I., which says: "No State shall * * * pass any * * * law impairing the obligation of contracts."

Third—The XIV. Amendment, which provides: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

We naturally turn our attention to the second provision, which says that "No State shall pass any law impairing the obligation of contracts" as being the principal question in volved in the case, the other being merely ancillary thereto.

The Supreme Court of Michigan, speaking through Mr. Justice Hooker, in the majority opinion, said:

> "Until the electors have adopted a constitution there is no public corporation, either municipal or quasi municipal, that can resist the authority of the state which has power to create both and to destroy them, and to make governmental agencies of them. It is not necessary to discuss municipal corporations proper, because we are not dealing with one, so we may pass them with the suggestion that under repeated decisions they exist through the action or acquiescence of the state; are subject to regulation and control by the state, except as qualified

by the provisions of the United States Constitution, and this has application to interests in the nature of private rights only which such corporations have and enjoy.

"The quasi corporations are radically different. They consist of counties, townships, school districts, highway districts, etc. They are governmental agencies, and it is—to say the least—doubtful if they are in any respect anything else, or have any rights that can be called private. They perform many functions, but these are for and about the business and policies of the state, which has imposed upon them the responsibility and expense of maintaining highways, schools, drains, bridges, etc. This may be called a right or an obligation, according to the views of the citizen who is taxed locally for the several purposes; but, whatever it is called, it depends upon the Constitution or law of the state, and otherwise would not exist. If upon the Constitution, the Legislature has not the power to change it; but if, upon the act of the Legislature, it is so subject to change. There is danger of confusing rights derived from these different sources, and it is possible to erroneously conclude that any apparent injustice in legislation is an invasion of local rights of self-government, and therefore invalid, when that can truly be said only of such as invade constitutional rights of self-government.

"The school district is a state agency. Moreover, it is of legislative creation. It is true that it was provided for in obedience to a constitutional requirement; and, whatever we may think of the right of the district to administer in a local way the affairs of the district under the Constitution, we cannot doubt that such management must be in conformity to the provisions of such laws of a general character as may from time to time be passed, *and that the property of the district is in no sense private property, but is public property, devoted to the purposes of the state, for the general good, just as almshouses and courthouses are,* although confided to local management, and applied to uses which are in a sense local, though in another sense general. * * * It does not seem to be denied that the Legislature may change the boundaries of districts. That has been too often done to admit of question. Numerous school districts have lost territory through city charters. * * *

"The authority of the Legislature to change the boundaries of counties, townships and school districts does not necessarily involve the obligation to reimburse the portion deprived of the use of the public property. Frequently such laws contain provisions for the purpose, but it is not necessary. *The property*

is public property, held and used for the purposes of the state, which may, in the absence of constitutional provision, make such disposition of it as it sees fit." [Rec., pp. 45 and 46.]

It will thus be seen that, in deciding the case, the Supreme Court of Michigan based its decision entirely upon the nature of the institutions known as "school districts," and the sources of their powers, rights, and privileges, that Court, in effect, claiming that, if these districts were municipal corporations proper, the statute would be void; but, as such districts are quasi corporations *(as claimed by that Court)*, therefore they are governmental agencies, with no rights which can be called private, and no rights of property which the Legislature is bound to respect. In other words, that the Legislature may take the property of these school districts, paid for and acquired by taxation of the resident taxpayers, and pass it over to some other governmental agency, or dispose of the same and take the proceeds thereof into the State Treasury and dispose of it without let or hindrance.

In determining these questions, we naturally first direct our attention to the questions, What sort of institutions are school districts? What are their characteristics and functions? What are their powers and duties? What are their rights and privileges? Are they creatures of statute or are they provided for by constitutional provisions? Are they simply agencies of the state government, with no rights which the Legislature is bound to respect Or, are they endowed with certain inalienable rights, protected by the Constitution, and which the Legislature cannot take away?

We contend that these school districts are public corporations, organized for municipal purposes; that they possess certain powers, rights and privileges which are protected by the Constitution of the United States as well as of the state, and which are beyond legislative control. In other words, that they possess a dual capacity or nature—one public, as an agency of the state and an instrument to assist the state government, and the other private, as representing the local community. That as an agency of the state they are subject to the will of the Legislature. That body may mold and fashion the policies of these institutions, as well as other municipalities; create or destroy them; grant them charters and franchises; and modify, amend or repeal such charters; prescribe, define, restrict, limit or take away their powers, and this, too, without the consent, and even against the protest, of the corporators—the inhabitants. But in their private character, or as representing the local commu-

nity, they have certain vested rights which apply to them as individuals, or, in such private character, which they hold in trust for the local community and of which they cannot be deprived except by due process of law and for just compensation. That these municipalities, if you please, antedated the Constitution and are recognized and provided for by that instrument, with all their historical rights and functions, among which is the right of local self-government. This right of local self-government is not confined simply to the choice of officers and agents, who shall manage the local affairs of the municipalities, but it extends as well to the management of all the local concerns of these institutions. The management and control of the property of these corporations is as much a matter of local concern as is the choice of their officers and agents. What, then, is the character of these institutions? Are they municipal corporations? And whence do they derive their rights, and powers, and privileges?

In order to determine this, it will be first necessary to look into the provisions of the State Constitution as well as the statutes of the State of Michigan, and the history of school districts in that state.

Section 4, Article XIII., of the Constitution of Michigan provides:

> "And the Legislature shall * * * *provide for and establish* a system of primary schools, whereby a school shall be kept, without charge for tuition, at least three months in each year, *in every school district in the state.*"

In compliance with this provision of the Constitution, the Legislature of the State of Michigan passed an act relative to the primary school system, Section 7, Chapter II., of which provides:

> "Every school district organized in pursuance of this chapter, or which has been organized and continued under any provisions of law of the State or Territory of Michigan, *shall be a body corporate,* and shall possess the usual powers of a corporation for public purposes, by the name and style of 'School District" * * * *"and in that name shall be capable of suing and being sued, of contracting and being contracted with, and of holding such real and personal estate as is authorized to be purchased by the provisions of law, and of selling the same.*"

That school districts are *corporations* there can, then, be no doubt, for, by the express wording of the statute above quoted, they are made such. This same statute also says that they shall possess the usual powers of *public* corporations, with the power to sue and be

sued, contract and be contracted with, and to acquire property, hold and sell the same.

The Constitution of Michigan also says, in Article XV., Section 1:

> "Corporations may be formed under general laws, *but shall not be created by special act, except for municipal purposes.*"

The act in question is a special act, creating this school district as a part of the school system of Michigan, and is made subject to the provisions of the general school law, except where otherwise provided for in this special act.

This school district, then, is either a municipal corporation, or else the act in question is absolutely void, as being in contravention of the above constitutional provision.

What is a municipal corporation, anyway? The Supreme Court of the State of Michigan, in the case of The People v. Hurlbut, 24 Mich., at page 88, speaking through Chief Justice Campbell, defines a municipal corporation as follows:

> "According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more nor less than investing the people of the place with the local government thereof."

What single element, then, is lacking to make these school districts municipal corporations? They certainly are not private corporations, for, if so, the act in question would be void because the Constitution prohibits the creation of anything but municipal corporations by special enactment. The Supreme Court of Michigan has decided, on more than one occasion, that school districts are municipal corporations.

Seeley v. Board of Education, 39 Mich., 486.

School District v. Gage, 39 Mich., 484.

Board of Park Commissioners v. Detroit, 28 Mich., 250, *per* Campbell.

But whether they are municipal corporations pure and simple or not, the fact remains that they are not mere governmental agencies, because by the very terms of the school law they are given additional powers not possessed by mere governmental agencies. They are given the power to sue and be sued, contract and be contracted with,

acquire and hold property, and sell the same. They are, then, to say the least, public corporations organized for municipal purposes, and as such are entitled to all the rights and benefits appertaining to that class of corporations.

Mr. Justice Campbell, in Board of Park Commissioners v. Detroit, *supra,* says: "A school district is as well recognized a municipality as a city." [Page 250.]

The learned judge who wrote the opinion for the Supreme Court of Michigan in this case says that school districts are *"of legislative creation."* This, to a certain extent, is true, and yet school districts as now constituted were in existence long before and at the time of the adoption of our Constitution, and are recognized by that instrument.

Stewart v. School District, 30 Mich., 69.

Belles v. Burr, 76 Mich., 1.

The Constitution provides, in Article XIII., Section 4, that—

"The Legislature shall * * * provide for and establish a system of primary schools, whereby a school shall be kept, without charge for tuition, at least three months in the year, in *every school district* in the state."

In Section 7, Article XII., it is provided that—

"The Legislature shall provide by law for the removal of any officer *elected by a* * * * *school district,* in such manner and for such cause as to them may seem best and proper."

These provisions of the Constitution recognize the fact that the state is to be divided into school districts, and that these school districts shall manage their own local affairs by officers to be chosen by these districts, and that these officers shall be elected by the local community.

School districts, then, are not strictly "of legislative creation." To be sure, there is no definition in the Constitution of a school district, neither does that instrument, in direct and positive terms, define or point out the characteristics or functions, nor prescribe the powers and duties, of school districts, nor does it definitely enumerate their rights and privileges. It speaks of school districts and assumes that they have a well-known and definite meaning. It speaks of them in the same manner as it does of cities, villages, counties and townships. It assumes that it is not necessary to define or characterize them further. In speaking of school districts, the

Constitution says that the Legislature shall "provide for and establish" a primary school system with school districts, while in speaking of cities and villages it says the Legislature shall "provide for the incorporation and organization" of cities and villages. In neither case does it go into detail. The Constitution is silent as to what is meant by the terms "cities and villages," the same as it is as regards "school districts," and yet no one is at a loss to know what is meant by these terms.

In People v. Hurlbut, 24 Mich., at page 67, Mr. Justice Christiancy said of these constitutional provisions concerning cities and villages:

> "The [constitutional] convention must be supposed to have recognized, to some extent, existing things, and to have had reference to cities and villages with substantially such organizations and upon such principles of self-government as had generally been customary."

And Chief Justice Campbell, in a very elaborate and learned opinion, said, at page 87:

> "We must never forget, in considering these terms [those of the Constitution], that most of them had a settled meaning before its adoption. Instead of being the source of our laws and liberties, it is in the main no more than a recognition and reenactment of an accepted system. The rights preserved are ancient rights, *and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions.* They were not towns or counties or cities or villages, in the abstract—or municipalities which had lost all their old liberties by central usurpation—but American and Michigan municipalities of common-law origin, and having no less than common-law franchises."

To paraphrase these quotations, and applying them to school districts, it is not unfair to say that the Constitutional Convention must be supposed to have recognized, to some extent, existing things, and to have had reference to school districts with substantially such organizations and upon such principles of self-government as had generally been customary, and that the term "school district" had a settled meaning before the adoption of the Constitution.

What, then, was the history of school districts prior to the adoption of the Constitution of Michigan, under which the general school laws were adopted? In order to determine this, we must consult

the statutes passed by the different Legislatures of that state, and even before it became a state.

In April, 1827, while Michigan was still a territory, the Territorial Legislature passed an act entitled "An Act for the Establishment of Common Schools."

Section 5 of this act provided for the diving of townships into school districts, the same to be under the supervision of a Board of School Inspectors.

Section 6 of that act provided for the election, by the free-holders and inhabitants of such districts, of officers to manage and control the affairs thereof; to select school house sites, and to tax the resident inhabitants of such districts to pay for such school house sites, to build school houses, and to pay for other property as well as the expense of running such schools. Entire management of the local affairs of these school districts was placed in the hands of these district officers.

Again, in November, 1829, the Territorial Legislature passed an act entitled "An Act to Provide for and Regulate Common Schools."

By Section 3 of this act it is provided that commissioners shall lay off the township for which they are elected into school districts.

Section 5 provides that the taxable inhabitants of these districts shall meet and elect officers to manage the affairs of the district.

Section 6 empowers these school officers to select and acquire by purchase suitable sites for school houses.

Sections 7, 8 and 9 provide for the building of school houses, and the raising of the necessary funds by taxation to be levied against the resident taxpayers.

This act also places the entire management and control of the local affairs of these districts in the hands of the officers to be chosen by the residents of the respective districts.

Again, in April, 1833, the Territorial Legislature took up this same question and passed an act entitled "An Act to Regulate Common Schools." This act again recognized the rights of the citizens to govern their local affairs, and provided that the several townships should be subdivided into school districts, the inhabitants of which

should choose their own officers, who should have entire management of their local affairs, select school sites, purchase and take title to same and to pay therefor, together with other district property, by taxes levied against the inhabitants of the respective districts.

So, it will be seen, that, during the territorial life of the State of Michigan, school districts were in existence, having the right of local self-government; the right to select their own officers for the management of their local affairs; the right to purchase, hold and enjoy property, both real and personal; to contract and be contracted with, and transact the ordinary business of such corporations.

After the admission of Michigan into the Union as a state, the Legislature continued this policy, and in the revised statutes of 1838, Chapter III., entitled "Of Primary Schools," provided for the dividing of the townships into school districts by the school inspectors; the election by the inhabitants of each school district of officers to manage the affairs thereof, and empowered those officers to acquire by purchase or otherwise school houses and sites, as well as other property, and to pay for the same by taxation of the resident taxpayers.

Again, in the revision of 1846, we find the same thing provided for, in Chapter XLVIII., entitled "Of Primary Schools."

So it will be seen that the system inaugurated during territorial times was continued by the Legislature after the organization of Michigan as a state, and the adoption of the first Constitution.

In 1850 our present Constitution was adopted. In that instrument school districts, as we have shown, were provided for, and by the express provisions of that instrument it was provided that the officers of these school districts *should be elected,* which means, by the inhabitants of the respective districts.

People v. Hurlbut, 24 Mich., 44.

We have thus traced the history of these institutions, and shown that by the adoption of the Constitution these school districts were spoken of as something well known, having well recognized characteristics and functions, and with rights and privileges appertaining to that class of corporations; and that they are municipal corporations, or, at least, public corporations organized for municipal purposes, with the right to hold and own property, make contracts, and

do other things necessary to carry on the business of such corporations.

MUNICIPAL CORPORATIONS, CHARACTER OF.

It is next important to determine what the character and functions, as well as the rights, duties and powers of these municipal corporations are.

The State has the right, through its Legislature, to mold and fashion the policy of its institutions, create or destroy municipalities, grant them charters, modify, amend or repeal those charters, define their powers, restrict those powers or take them away; *but the right of local self-government by these municipalities and local institutions is an absolute and vested right which the State cannot take away.*

This act preceded the adoption of the Constitution, and is recognized by that instrument.

Mechen on Public Officers, Section 123.

People v. Hurlbut, 24 Mich., 44.

Attorney General v. Detroit, 29 Mich., 110.

People v. Detroit, 28 Mich., 228.

Attorney General v. Detroit, 58 Mich., 213.

Moreland v. Millen, 126 Mich., 381.

Maynard v. Board, 84 Mich., 226.

Stuart v. School District, 30 Mich., 69.

Belles v. Burr, 76 Mich., 1.

State v. Denney, 118 Ind., 449.

Evansville v. State, 118 Ind., 426.

City of Clinton v. Cedar Rapids Railway Co., 24 Ia., 455.

State v. Moores, 55 Neb., 480.

Cincinnati W. & Z. R. Co. v. Commissioners, 10 Ohio St., 77.

Parker v. Commonwealth, 6 Barr (Penn.), 511.

People v. Albertson, 55 N. Y., 50.

Rathbone v. Worth, 150 N. Y., 459.

Benson v. Mayor, etc., of New York, 10 Barb., 223, 224, 225.

State v. Constantine, 42 Ohio St., 427.

West Point Water Power & Improvement Co. v. State, 42 Neb., 208.

People v. Mayor, 51 Ill., 17.

People v. Lynch, 51 Cal., 15.

Grogan v. San Francisco, 18 Cal., 590.

Cooley on Constitutional Limitation, 5th ed., 45, 203, 209, 225, 228.

Dillon on Municipal Corporations, 4th ed., Section 9.

Van Holst Constitutional Law, 271.

In People v. Hurlbut, *supra,* Chief Justice Campbell, in a very exhaustive and learned opinion, regarding the right of local self-government, says:

"Our constitution cannot be understood or carried out at all except on the theory of local self-government; and the intention to preserve it is quite apparent. In every case where provision is made by the Constitution itself for local officers, they are selected by local action. All counties, towns *and school districts* are made to depend upon it. All elections are required to be in local divisions where electors reside. Cities are represented in the Board of Supervisors, and it is quite possible for their members to outnumber the rest. It certainly cannot be that the State can control those bodies by sending its own agents there, and it cannot be possible that it was contemplated that any member of that board should be selected by a different mode of election or appointment from the rest. Cities may become counties, and surely there can be no county without popular institutions. Cities have been judicially declared to come within the denomination of 'townships' so far as to be entitled to library money; *and unless they are made to include school districts, they need not be compelled to have free schools.* No one would venture to assume that the constitution was designed to leave them in such a position. It is impossible to

read that document without finding the plainest evidence that every part of the State is to be under some system of localized authority emanating from the people.

"This is no mere political theory, but appears in the Constitution as the foundation of all our polity. There is no middle ground. A city has no constitutional safeguards for its people, or it has the right to have all its officers appointed at home. Unless this power is exclusive, the State may manage all city affairs by its own functionaries. The only reasonable meaning of the constitutional clause in question is, that when the Legislature has designated the time and manner of appointment or election, the local authority shall fill the offices as so ordained." [pp. 89, 90.]

Mr. Justice Cooley also wrote an opinion in that case, and in a very careful consideration of the matter said:

"The question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this State is or is not a mere privilege, conceded by the Legislature in its discretion, and which may be withdrawn at any time at pleasure. I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right. * * *

"If therefore, no restraints are imposed upon legislative discretion beyond those specifically stated (in the Constitution), the township and county government of any portion of the State might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupilage and dependence to any extent, and for any period of time the State might choose.

"The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great

pains to surround the life, liberty and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. *We must assume* either an intention that the legislative control should be constant and absolute, or, on the other hand, *that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made.* That this last is the case appears to me too plain for serious controversy. The implied restrictions upon the power of the Legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. *The Constitution has been framed with these restrictions in view,* and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

"The circumstances from which these implications arise are: *First,* that the Constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, *second,* that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system." [Pages 96, 97, 98.]

After a very exhaustive consideration of this subject from an historical standpoint, this learned judge continues:

"In view of these historical facts, and of these general principles, the question recurs whether our State Constitution can be so construed as to confer upon the Legislature the power to appoint for the municipalities, *the officers who are to manage the property, interests and rights in which their own people alone are concerned.* If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility

that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except as the State may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other." [Pages 105, 106.]

And again:

"The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the Constitution the power to establish it was prohibited; *it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written.*

* * * * * * * * * *

"The State may mold local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the State cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the State not only shaped its government, but at discretion sent in its own agents to administer to it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all." [Pages 107, 108.]

These views were concurred in by the full bench who graced the Michigan Supreme Court at that time, and never have been departed from by that tribunal, until the decision in this case, and then only to a limited extent. See also a very careful and learned consideration of this subject in the case of People v. Lynch, *supra,* and State v. Moores, *supra.*

The right of local self-government is not confined to the choice of the officers who manage the local concerns of municipalities, but it extends to the management of all the local concerns of those institu-

tions. The management of their property is as much a matter of local concern as is the choice of their officers.

Municipal corporations have a dual capacity: *Public,* as an instrument of the general state government, and *private,* as representing the local community. As an instrument of government they are agencies of the State and parts of the general State government by which they are created. As such, they are subject to the plenary control of the Legislature. Their charters may be amended, changed, modified, altered, or repealed at the will of the Legislature, and without the consent and even against the protest of the corporators. But, in their local character, they may contract and be contracted with, acquire, purchase and hold property, and sell and dispose of the same, and sue and be sued. In their local or private character they also choose their officers, agents and representatives by whom their local concerns are managed. In their private or local character they act not as public corporations or governmental agencies, but as private corporations or individuals. They represent the local interests of the community, primarily, and not those of the State at large. Their character and rights preceded the Constitution, and are recognized by that instrument. The courts of this State, and of the other States, as well as the Federal Courts, recognize a vast difference between the public functions of a municipal corporation and those of a local nature, and hold that, as to those matters which pertain exclusively to the general State government, the municipal corporations are public corporations; but as to those matters which are of local concern, they partake of the nature of private corporations, and are governed by the rules applicable to such corporations.

People v. Hurlbut, 24, Mich., 44.

Board v. Detroit, 28 Mich., 228.

Dartmouth College Case, 4th Wheat., 518.

Milwaukee v. Milwaukee, 12 Wis., 100.

Pearson v. State, 56 Ark., 148.

Mt. Hope Cemetery v. Boston, 158 Mass., 509.

Benson v. Mayor, &c., New York, 10 Barb., 223, at 244.

Clinton v. Cedar Rapids R. R. Co., 24 Ia., 455.

State v. Haben, 22 Wis., 660.

Dillon Municipal Corporations, Sec. 68 to 74.

Cooley on Const. Lim., 5th ed., 289 to 295.

Mr. Justice Storey, in his opinion rendered in the celebrated case of Dartmouth College v. Woodward, *supra,* said:

"Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong to the government." [Page 668.]

Again:

"It may also be admitted that corporations for mere government, such as towns, cities and counties, may in many respects be subject to legislative control. *But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendant that it may at its will take away the private property of the corporation, or change the use of its private funds acquired under public faith.* Can the Legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? * * * From the very nature of our governments, the public faith is pledged the other way." [Page 694.]

Justice Cooley, in the case of People v. Hurlbut, said:

"The municipality as an agent of the government is one thing; the corporation as the owner of porperty is in some particulars to be regarded in a very different light. The Supreme Court of the United States held at an early date that grants of property to public corporations could not be assumed by the sovereignty. When the State deals with a municipal corporation on the footing of contract, the municipality is to be regarded as a private company." [Page 104.]

See also, Board of Park Commissioners v. Common Council of Detroit, 28 Mich., 228.

In the case if Milwaukee v. Milwaukee, *supra,* at page 100, the court says:

"The difficulty about the question is, to distinguish between the corporation as a civil institution or delegation of merely

political power, and as an ideal being endowed with the capacity to acquire and hold property for corporate and other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified or destroyed by the Legislature; but in its capacity of owner of property, designed for its own, *or the exclusive use and benefits of its inhabitants,* its vested rights or property are no more the subject of legislative interference or control, without the consent of the corporators, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body. * * * In its character of a political power, or local subdivision of government, it is a public corporation; *but in its character of owner of property, it is a private corporation, possessing the same rights, duties and privileges as any other."*

See also, 1st Dillon, Municipal Corporations, 4th ed., Sections 65 to 71 inclusive.

Judge Cooley, in his work on Constitutional Limitation, 5th edition, page 292, says:

"The rights acquired by municipal corporations, either by grants from the State or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and cannot be taken away."

We think we have shown by the foregoing authorities that municipal corporations have a dual capacity, viz: *First,* public, as representing the state or general state government, and, *second,* private, as representing the local community. That these municipalities have certain vested and inalienable rights, and among those is the right of local self-government; the right to select and choose their own officers; the right to manage and control their local affairs; the right to acquire and hold property, the right to control that property, and which property cannot be taken away from them by legislative enactment, or by any other power, without due process of law and just compensation. If these rights are vested rights, then these local communities cannot be deprived of those rights without violation the provisions of the Constitution of the United States, prohibiting any State from passing any law impairing the obligations of contracts. For from the very nature of our government, the public faith is pledged the other way, and this pledge is a compact.

The question recurs, then, does this act, as passed, impair the

obligation of contracts within the meaning of this constitutional provision? We realize the fact that this Court, as well as the courts of different States, has held that municipal charters are in no sense contracts between the State and these municipalities. But we contend that this holding is not controlling in this case, and has no bearing upon the question at issue. It is not a question of whether these *charters* are contracts between the State and the municipalities, but the question is higher and more far-reaching. It is a question as to whether there is an implied contract between the people of the state and the people of each local community, that these communities shall not be deprived of their rights of local self-government and the right to manage their local affairs in accordance with their own wishes, and shall not be deprived of their vested rights in the municipal property acquired for the benefit of the inhabitants. This, we contend, is true.

See the following authorities:

Board of Park Com. v. Detroit, 28 Mich., 228.

People v. Hurlbut, 24 Mich., 44.

Dartmouth College Case, 4 Wheat., 518.

Milwaukee v. Milwaukee, 12 Wis., 100.

State v. Haben, 22 Wis., 616.

Mt. Hope Cemetery v. Boston, 158 Mass., 509.

Grogan v. San Francisco, 18 Cal., 590.

Pearson v. State, 56 Ark., 148.

Cooley's Constitutional Limitations, 5th ed., 291 to 294.

1st Dillon on Municipal Corporations, 4th ed., Sec. 65 to 72.

Warren v. Lyons City, 22 Iowa, 351.

Clinton v. Cedar Rapids R. R. Co., 24 Iowa, 476.

Opinion of Mr. Justice Fields in Tippecanoe Co. v. Lucas, 93 U. S., 108.

Briston v. New Chester, 3 N. H., 524.

Benton v. Mayor, &c., New York, 10 Barb., 223, at 244-5.

People v. Supervisors of West Chester, 4 Barb., 64.

If the contention of the learned justice who wrote the opinion in

this case is true, and is to be the law, it follows that the Legislature may by special enactment take a court house and other property of any county and capriciously pass the same over to another county without any compensation and against the protest of the people who were taxed to pay for the same.

It also follows, if "The porperty is public property, held and used for the purposes of the State, which may make such disposition of it as it sees fit," that the State may appoint special agents to sell and dispose of these county buildings and school houses, take the money into the State Treasury and devote it to any state purpose the Legislature may see fit. We do not believe this is true. To use the language of Mr. Justice Story, in the celebrated case of Trustees of Dartmouth College v. Woodward: *"From the very nature of our government, the public faith is pledged the other way, and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation."*

Also, to use the words of Mr. Justice Cooley, in the case of People v.Hurlbut, *"The doctrine that within any general grant of legislative power by the Constitution, there can be found authority thus to take from the people the porperty they have acquired and paid for by taxation of the property of the inhabitants of the local community, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest some time, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether."*

The only ground on which the Supreme Court of Michigan based its decision was the claim that these local communities had no vested rights in property, but that this property belonged to the State and could be disposed of as the state sees fit. This we contend is not true.

In Pearson v. State, 56 Ark., 148, the Supreme Court of that State said:

> "The statement that counties *and school districts* are agencies of the state, and therefore subject to legislative control or annihilation, is a misleading generality. *The corporate entity is a legislative creation,* and its powers may be restrained, its functions changed, or its existence destroyed, at the will of the Legislature; *but in so far as it has acquired and holds property, it is but a trustee for the local public; and although its powers may be withdrawn or its existence ended, the property which*

survives it belongs to the same public, and must be, in some way, applied to its use. It has no contract right to exist as a corporation, but the public that it represented has a vested right in the municipal property acquired for its benefit, and is entitled to demand that such property be applied to its uses."

It seems to us that no language could be more applicable to the facts of any case than the language just quoted is to this case. It is a clear and succinct statement of the proposition, and is pregnant with good sense.

It is true, as said by that learned court, that the corporation *"has no contract right to exist as a corporation,"* but, as said by Mr. Justice Dillon, in the case of Clinton v. Cedar Rapids R. R. Co., 24 Iowa, at page 476:

> *"While the corporation exists,* and has been allowed to acquire private property, such property is doubtless protected by the constitutional provisions the same as the private property of the citizen. The distinction is just here. A city by its constituent act may be authorized to acquire property for a *market house,* a *public hall* or the like. Of this property the city cannot be deprived by legislative act, except it be taken for public use, and if so taken the city is entitled to compensation."

This same eminent jurist, in his excellent work on Municipal Corporations, Vol. I., Sec. 68, said: "That property acquired and owned by a municipal corporation by legislative consent is not subject to an unlimited power of the Legislature over it, *is consonant with natural justice.* The need of having property and of property rights is one of the main reasons why municipal corporations are created. * * *

"If a municipal corporation, as representing a distinct community, be regarded as a *legal person,* the Legislature in effect says to it, *'You may at your own expense acquire property;' and if it acts on such permission, the courts may, perhaps fairly deduce a contract that the Legislature, while it may regulate and change the uses of such porperty, will not deprive the corporation of it.* Accordingly the weight of opinion seems to be in favor of the doctrine that there may be in such corporations rights under contracts and grants which are beyond destruction by the Legislature."

And again, in Section 68a, he says:

> "It is believed by the author, for the reasons suggested in this chapter, that, while the Legislature has full power of legitimate regulation and control, it cannot deprive them [that is, in es-

sence, the *people* of the locality at whose expense it has been acquired, or for whose benefit it was granted] of such property. *It is in effect fastened with a trust for the incorporated municipality so long as the Legislature suffers it to live, and for the benefit of the people of the locality if the corporate entity which represents their rights shall be dissolved.*"

Judge Cooley, in his work on Constitutional Limitations, sums up the matter thus:

"The rule upon the subject we take to be this: When corporate powers are conferred, there is an implied contract between the State and the corporators *that the property which they are given the capacity to acquire for corporate purposes under their charter shall not be taken from them and appropriated to other uses.* If the State grants property to the corporation, the grant is an executed contract, which cannot be revoked. *The right acquired,* either by such grants *or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and cannot be taken away.*" [Cooley's Const. Limitations, 5th ed., 292.]

And again, this learned judge and author, in the note to the next page of that work, says:

It will be observed that the strong expressions of legislative power is generally to be found in cases where the thing actually done was clearly and unquestionably competent. * * * *These strong and general expressions should be compared with what is said in Grogan v. San Francisco, 18 Cal., 590, in which the right of municipal corporations to constitutional protection in their property is asserted fully.*"

Mr. Justice Field, in the case of Tippecanoe Co. v. Lucas, 93 U. S., 108, in speaking upon this subject, said:

"There would seem to be reasons, cogent, in abstract justice, against a diversion by the Legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants; but whether a contract between the State and the municipality, with the protection of the Federal Constitution, is implied in such cases, that the property acquired shall not be diverted from the purpose of the municipality and appropriated to other uses is a question we are not called upon to determine."

Thus leaving it an open question, in so far as adjudicating the question was concerned, but plainly stating the opinion of this eminent judge upon the queston.

Almost on all fours with the case at bar is the case of State v. Haben, 22 Wis., 660. In that case, by special legislative enactment, the City of Oshkosh was empowered to raise money by taxation of the local taxpayers to build a school house, and to aid in locating a State Normal School in that city.

The authorized sum was raised to pay for the building of the school house, but the sum authorized to be raised for the State Normal School was not raised.

Afterward the Legislature passed a special act appropriating the fund raised for building the school house to the purposes of the State Normal School, and the question involved was as to the power of the Legislature to take the funds raised for building a school house from the city and appropriate it to the uses of the State in erecting a normal school.

The Supreme Court of that State, speaking through Chief Justice Dixon, said:

> "The question then is: Was it competent for the Legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the Treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing a site for a State Normal School in that city? We are clearly of the opinion that it cannot. *It is well settled as to all matters pertaining to vested rights of property, whether real or personal,* and to the obligation of contracts, *that municipal corporations are as much within the protection of the Federal Constitution as private individuals. The Legislature cannot divest a municipal corporation of its property without the consent of its inhabitants, nor impair the obligation of a contract entered into with or in behalf of such corporaton.*

That same learned judge had, on a previous occasion, been called upon to consider this same question. We would call attention to his very comprehensive language used in deciding the case of The Town of Milwaukee v. The City of Milwaukee, 12 Wis., at page 101, where he said:

> "The inviolability by legislative interposition of the rights and franchises of a private corporation, in cases where there is not, by its charter, or the Constitution of the State by which it is granted, a reservation of power to repeal or modify, is demon-

strated and established in the case of *Dartmouth College v. Woodward,* 4 Wheat., 518, by a force of reasoning and power of argument, to the strength and clearness of which nothing can possibly be added. It was there held that the charter of such a corporation was a contract within the meaning of the first subdivision of Section 10, Article I. of the Constitution of the United States, which declares that no State shall pass *any law impairing the obligation of contracts.* * * *

"The reasoning of that case extends as well to the power of the Legislature to interfere with the franchises as the rights of property of such corporation; but it is only with respect to the latter that it can be considered applicable to the question we are now considering. And there it is clearly so. Every argument used goes with equal force to prove that *the Legislature has no power to divest a municipal corporation of its property, previously acquired by purchase or otherwise.*"

And again:

"If the Legislature could, by virtue of its power *of division* or repeal, deprive a town of its property; and if, after having created it and incited it to such acquisition, by giving it the capacity, it shoud do so, such proceeding would be in the highest degree arbitrary and indefensible." [Page 103.]

In the case of Detroit v. Detroit & Howell Plank Road Co., 43 Mich., 140, at 148, Mr. Justice Cooley, in delivering the opinion of the Supreme Court of Michigan, said:

"Even municipal corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it." *(Citing with approval, among others, State v. Haben, supra.)*

In the case of Board of Park Commissioners v. Detroit, *supra,* this same eminent judge, speaking for the court, said:

"But it cannot be contended that authority in the Legislature to determine what shall be the extent of capacity in a city to acquire and hold property is equivalent to, or contains within itself, the authority to deprive the city of property actually acquired by legislative permission. As to the property it thus holds for its own private purposes, a city is to be regarded as a constituent in state government, and is entitled to the like protection in its property as any natural person who is also a constituent. The right of the state, as regards such property, is a

right of regulation, and though broader than exists in the case of individuals, is not a right of appropriation. The constitutional principle that no person shall be deprived of property without due process of law applies to artificial persons as well as natural, *and to municipal corporations in their private capacity,* as well as to corporations for manufacturing and commercial purposes." [Page 240.]

But why make any further quotations from authorities? The principle is well established that the property of these local communoities is not state property, but is private property of the municipality, or is held in trust for the local community, for their own benefit. To be sure, the State at large is interested in having its citizens educated, and for that reason the Constitution requires the State Legislature to provide a system of primary schools for the whole state. The carrying out of this purpose of the state is confided to local communities—school districts—who serve primarily the people of these communities, and the state only secondarily. The school houses and other property are paid for by the corporators of the local communities and not by the state, and these buildings and other property are for the benefit of the inhabitants of those districts.

Would it be contended for one moment that the state could bring a suit at law for a trespass committed upon this school property? If the property belongs to the state, it certainly could do so. But no lawyer of any standing would venture such an opinion.

It follows from the reasoning of the foregoing authorities that the property of these school districts is the private property of the districts, and that they have a vested right therein, such that it is protected under the Federal Constitution.

If the Federal Constitution protects the vested rights of these local communities in their property, why not all other vested rights —that of local self-government.

From the very nature of our government the public faith is pledged to give and preserve to municipal corporations the right of local self-government—power to select their own officers, power to contract and be contracted with, power to purchase, acquire and hold property, control, manage and sell the same, and power to control and manage their local affairs—and this pledge is a compact; and that compact is subject only to judicial inquiry, construction and abrogation.

In saying what we have said, we do not wish to be understood as denying to the Legislature the right to mold and fashion the policies of municipalities; to grant them charters, modify, amend or repeal the same; to prescribe what officers shall have the management of the local affairs, prescribe and define their duties and powers, and change or modify them. Neither do we deny the right of the Legislature to prescribe proper limitations to the powers of these corporations to acquire and hold property, deal with and dispose of the same, and make contracts in conducting local affairs. We also concede the right to the Legislature to change the boundaries of such municipalities by dividing the territory thereof, or consolidating two or more such corporations. Under such circumstances, however, the Legislature should make suitable provisions for preserving the vested rights of these institutions, and in case of divison of the territory should provide for the equitable division of the corporate property. In case of the consolidating of two or more municipalities into one new corporation, the Legislature may also transfer to this new corporation the property of the old municipalities. All these powers we frankly concede to the Legislature. But what we do contend for is that when changes and modifications are made, which relate to matters concerning the private or local interests of the municipality and the corporators, all the vested rights of the old corporations and communities must be carefully preserved as well as the protection of the inalienable rights of the new community provided for.

Now, let us analyze this act in the light of the foregoing authorities and considerations and see if these vested rights are interfered with in such a manner as to contravene the provisions of the Federal Constitution. The district, as organized by this act, was formed by taking the old district, in which the Village of Jerome was situated, and adding thereto parts of three other districts existing and situate in the Townships of Somerset and Moscow, in Hillsdale County, the territory thus united being incorporated into one school district by this special act of the Legislature, the same to be known as "The Public Schools of the Village of Jerome, Hillsdale County, Michigan."

Section 1 defines the boundaries of this district.

Section 2 provides for six trustees, the act in question naming and appointing them. They were to meet within twenty days after the act took effect, and divide themselves into three equal divisions; the term of the first division to expire at the time of the first annual meeting, the second at the second annual meeting, and the third at

the third annual meeting. These terms were to be decided by lot, and if any vacancies occurred in their number, these trustees were authorized to fill them by appointment. The effect of this provision is to entirely deprive the local taxpayers and voters of all voice in the choice of these officers. Ordinarily when the Legislature by special act creates a new municipality, there is no question of the right and power of such legislature to appoint provisional officers to organize the corporation and set the machinery to going. But in this case such appointments are not and do not purport to be provisional, but are permanent appointments. The terms of office are to run for one, two and three years, without any way of depriving these officers of their positions until the expiration of the full terms for which they were appointed.

In the court below it was contended by counsel for the respondents that if the provisions of Section 2 of this act, appointing these trustees for terms extending beyond the constitutional time, is void, that there was then a vacancy in the office of four of the trustees, and that the remaining two might at once proceed to fill these vacancient. The fallacy of this argument is answered by the act itself. By the very terms of the act there is nothing to determine which of these trustees are to hold until the first annual meeting, nor which ones will hold over until some future time, until they shall all meet and put in force the lottery provided for in this section. They are to cast lots to see who shall wear the coat. Those who are to hold beyond the first annual meeting have no right to perform any duties appertaining to their positions. And thus it happens that there are no trustees who can fill the vacancies, and the district is without officers with which to carry on its business. There is no one authorized to determine who is to hold office provisionally, and consequently no one has any authority to fill vacancies. Besides this, there is absolutely no way in which to carry this act into effect, except by judicial legislation—that is, by amending this act by judicial construction. The very terms of the act itself provide for full terms. There is nothing in the act that can be, by any possibility, construed as creating provisional terms. By what right, then, can the Court say that the Legislature, in passing this act, did not mean to appoint these men for full terms, but only intended to make provisional appointment?

Judge Campbell, in his opinion in the case of People v. Hurlbut, heretofore cited, on page 90, says:

"Assuming that the Legislature can make provisional appointments to set an act in operation, this is not such action. The board appointed have no other or different powers than any

of their immediate or remote successors would have. The law contains nothing requiring or authorizing any mere preliminary action. The officers are to hold by classified terms, just as the judges of the Supreme Court and Board of Rgents did, for two, four, six and eight years, and no successors can be chosen short of the expiration of those periods *without directly violating the terms of the law.* It is not admissible construction to insert a meaning which is inconsistent with, and positively contradicts, the plain terms of the statute. * * * It therefore follows, necessarily, that the statute can have no validity, because there is no lawful way of putting it in operation."

Just so in this case. It is not admissible construction to give this act a construction that is plainly opposed to the very terms of the act. This act not only does not purport to provide for provisional appointments, but the very terms of the act indicate that there was no intention to provide for anything other than permanent appointments.

Certain duties and powers were conferred upon these trustees named in the act, which by the very terms of the act were denied to the successors to be elected when their terms should have expired. These officers were to have the right, and it was made their plain duty, to confiscate all the property of these old districts, to sell the same at private or public sale, and apply the proceeds thereof to improving the school building already existing in the village of Jerome, which should be the central school building of the new district.

To use the language of Mr. Justice Grant, who wrote the dissenting opinion in this case, "The Legislature has no more right to interfere with local self-government therein than it has to interfere with the local self-government of cities, villages and townships. The Constitution gives these corporations the same right to control their local affairs that it gives to other municipal corporations. This act does not pretend to appoint these six trustees as provisional officers, appointed for the sole purpose of launching the corporation into existence and providing the inhabitants thereof with the right to then assume the reins of government and select their own officers. If the Legislature could appoint these trustees for one and two years, it could as well appoint them for ten or more. This provision of the act is, therefore, clearly unconstitutional."

Section 3 of this act provides for the election of trustees upon the expiration of the terms of office of those who were appointed by the act.

Section 4, in addition to the powers imposed by the act, as trustees of such school district, also confers upon them all the powers and privileges conferred upon union and graded school districts by the general law, and the powers and duties of school inspectors, and these trustees are made *ex-officio* a board of school inspectors.

School inspectors are constitutional officers, to be elected by the people of the several townships of the State at their annual township meetings in each year. The Constitution makes them township officers, and not school district officers. They have nothing to do with school districts as district officers; their duties appertain entirely to the township.

The incorporation of this school district by special enactment of the Legislature did not sever this territory from the rest of the township. It is therefore subject to the jurisdiction of the board of school inspectors of the several townships in which this district is situated, except that by the creation of this district by special enactment of the Legislature such board is deprived of the right to change the boundaries thereof, as it might be in other instances, and such boundaries can only be changed by a new act of the Legislature.

The Constitution says:

> "There shall be elected annually on the first Monday of April, in each organized township, * * * one Township Clerk, who shall be *ex-officio* School Inspector, * * * (and) one School Inspector, * * * whose powers and duties shall be prescribed by law." [Art XI., Sec. 1.]

This provision of the Constitution makes school inspectors constitutional township officers, and as such they are to be elected annually by the electors of the township. How, then, can it be said that these trustees may be made *ex-officio* a board of school inspectors, with all the powers and duties of school inspectors of townships?

It is beyond the power of the Legislature to appoint by legislative enactment constitutional officers. This act does that very thing, both as to these school inspectors and as to the trustees of the school district. This also deprives the people of this municipality of the right of choosing their own officers to manage their own local affairs.

By section 7 all the lands, school houses and sites, furniture, libraries, property and effects belonging to the several old school districts were transferred to and declared to be the property of the schools established by the act. And all the debts and obligations of the

three districts were imposed upon the new district, and this, too, without making any provisions whatever for an equitable division of the property between the territory included in the new district and the territory left out. This we contend cannot be done.

As we have heretofore said, we do not deny the power of the Legislature to divide the territory of a municipality, neither do we deny the authority of the Legislature to consolidate several municipalities into one new corporation. But what we do contend for is that when the Legislature divides a municipality it cannot take the property away from the old municipalities and transfer it to the new. It may, undoubtedly, provide for the equitable division of the property between the several subdivisions of the territory constituting the old municipality. It must be borne in mind that nowhere is the corporate existence of these old districts destroyed. There is simply a division of the territory of existing districts, and the incorporation of one entirely new district from parts of these old ones.

The rule of law is universal that when a municipality is divided the property may be divided and apportioned to the territory remaining in the old municipality and that set off, provided provision is made by law therefor, *but if no such provision is made, the property belongs to that part of the old municipality still remaining.*

Township of Saginaw v. School District, 9 Mich., 541.

Town of Milwaukee v. City of Milwaukee, 12 Wis., 93, *at* 104.

Inhabitants of Wyndham v. Inhabitants of Portland, 4 Mass, 384.

Hampshire v. Franklin, 16 Mass., 76.

City of Winona v. School District, 40 Minn., 13.

The reason for this doctrine is that the portion of the old district remaining constitutes the old municipality. The detaching of a part of the territory is not destroying the corporate entity of the old municipality. The part of the district set off is simply incorporated into a new legal personality, and this new being is not entitled to the corporate property of the old corporation. The territory set off, however, may be entitled to an equitable division of the corporate property, provided this division is provided for by the legislative act which divides the territory. Not because this property legally belongs to the new corporation, but because the corporators whose property is set off have been taxed to assist in paying for this

property, and in equity they are entitled to a portion thereof, but not legally. The courts, therefore, have held that it is competent for the legislature to make an equitable division, but not to transfer the entire property. This property constitutes the private property of the old districts, and cannot be taken away from them.

In the court below, it was contended by counsel for respondents that the exact question involved here was decided by the court of Michigan in the case of Perrizo v. Kesler, 93 Mich., 280.

This, however, we deny. In that case there was no district formed by legislative enactment. The district in that case was formed by the people of the township voting therefor, in accordance with the terms of a statute passed which permitted townships in the Upper Peninsula to organize into one township school district by the consolidation of the districts constituting the township. And the Court held that in consolidating the districts there was no constitutional objection to the transfer of the property of the several districts consolidated to the new consolidated district, they being constituents of the new district and not being deprived of their property, the act simply working an injustice to those districts which had contributed the most to the general fund by the transfer of their property to the new district, they being thereby subjected to more than their equitable share of taxes for running the new district. The question of transferring property from one municipality to another was not involved. There was no question in that case of the division of a municipality, nor of the confiscation of the property of one municipality by the Legislature and the transferring of the same to another.

In the case of The Town of Milwaukee v. The City of Milwaukee, *supra*, the exact question involved in this case was considered and decided. In that case there had been a division of the territory by legislative enactment, and the question of the effect of this division on the property rights of the old and the new municipalities was very ably discussed by the court and a long list of authorities cited. In that case the statute was silent on the question of the property, but the City of Milwaukee contended that the effect of the act was to transfer the property in question to the city, and the court, in deciding the case, on page 102, said:

> "If the Legislature, in the present instance, without the assent of the town, had attempted, by act, directly to transfer the lands in question to the city, * * * could any lawyer be found who would hesitate for one moment to give his opinion that such legislation was void? And could the Legislature, by by direct? Did it possess this power as an incident to that of

indirect means, accomplish that which it was impossible to do enlarging the limits of the city or diminishing those of the town? We think not."

The language in that case, we think, is peculiarly applicable to this case for the reason that the case presumed was precisely such a case as this one is, and the case actually decided was, in all of the essential features, the same, and was decided upon the principle of the supposed case, which would be on all fours with this case.

The Wisconsin court further said:

"If the Legislature could, *by virtue of its power of division,* or repeal, deprive a town of its property, and if, after having created it and incited it to such acquisitions, by giving it the capacity, it should do so, such proceeding would be, in the highest degree, arbitrary and indefensible. *The perfidy of such act would be acknowledged by all men.*

"We do not, however, wish to be understood as saying that the Legislature may not, upon the repeal of the charter of a municipal corporation, *or division of its territory,* provide for a fair and equitable division of its public property. It may undoubtedly do so." [Page 103.]

In deciding this case, the learned judge of the Michigan Supreme Court who delivered the majority opinion, cites, as sustaining the right of the Legislature to confiscate the property of these old school districts and pass it over to the new, Sections 126, 127, 128 and 129 of Dillon on Municipal Corporations. It seems to us that the authority quoted and cited from so extensively by the learned judge is authority directly in point to sustain our contention.

Section 127, quoted by the Michigan court, says:

"*In case of division,* the Legislature may, as we have already seen, apportion the burden between the two, and determine the proportion to be borne by each. In Connecticut, 'The Legislature,' says the Supreme Court, 'have immemorially exercised the power of dividing towns at its pleasure, and upon such division, *apportioning the common property and common burdens in such manner as it shall seem reasonable and equitable.*'"

Section 128 says:

"So it has been frequently held that if a new corporation is created out of the territory of an old corporation, or if any part of its territory or inhabitants is annexed to another corpor-

ation, unless some provision is made in the act respecting the property and existing liabilities of the old corporations, the latter will be entitled to all the property and be solely answerable for all the liabilities."

This is exactly what we contend in this case: That by creating this new corporation out of portions of these old corporations, and there being no provisions made respecting the division of the property and existing liabilities of the old corporations, these old districts were entitled to all of the property, and would be solely answerable for all of the liabilities.

Again, in Section 129, quoted, it says:

"But upon the division of the old corporation, and the creation of a new corporation out of a part of its inhabitants and territory, or upon the annexation of a part to another corporation, the Legislature may provide an equitable appropriation or division of the property, and impose upon the new corporation, or upon the people and territory thus annexed, the obligation to pay an equitable proportion of the corporate debts."

This authority, it seems to us, not only supports our contentions, but is absolutely contradictory of the position taken by counsel for the respondents and by the learned judge who wrote the majority opinion and relied upon this authority to support his contention.

The property, then, of these old districts being such that they could not be deprived thereof by legislative enactment, the Legislature, in making division of the territory, must either allow the old districts to retain their property as it was before the division of the territory, or provide by legislative enactment for an equitable division of the property and burdens of the old districts, but could not transfer the entire property to the new district without compensating the old district therefor.

Section 9 fixes the site of the school house to be the one then owned and occupied by "Fractional School District No. 2," the school district in which the Village of Jerome was situated, and makes the building situate thereon the Central School Building of the Public Schools of the Village of Jerome, and provides that the same shall be used for the academic and more advanced classes of scholars and such other classes of scholars as the board should deem necessary.

Section 10 of the act confers upon this board, appointed by Legislative enactment, the arbitrary power to take the property of these old districts, dispose of the same at public or private sale, and then

take it to the Village of Jerome and permanently affix it to the school building there situate. It does not leave it to the discretion of the board of trustees as to what shall be done with this property, but says it is to be usel in making repairs, imporvements and additions to the property of Jerome, and in order to place the matter beyond the control of the people intersted in the matter the act confers this authority upon the board which was appointed by the act *and upon no other.* And, in order to make sure that this board shall make this confiscation complete before the people can, by any possibility, have any voice in the matter, authority is given to this board to sell this property at private sale.

The powers thus given these trustees by the Legislature are powers of final action, because they are authorized to sell real estate and personal property at public or private sale, and upon such sale to vest title in the purchaser, and this, too, without approval or control by the parties interested therein, and at whose expense it was obtained.

They are also authorized and directed to make repeairs and improvements upon this central school building, thus, impliedly at least, authorizing them to incur indebtedness for and on behalf of such district, which indebtedness must be paid by taxing the inhabitants thereof. This is in effect exercising the power of taxation, which is one of the highest attributes of sovereignty. No precedent entitled to respect can justify such a grant of power, for from the very dawn of our liberties the principle most unquestionable of all is this: That the people shall vote the taxes they are to pay or be permitted to choose representatives for that purpose.

Board of Park Com. v. Detroit, 28 Mich., 248, 250.

Hubbard v. Springwells, 25 Mich, 156, 157.

The State cannot confer upon its own agents power to purchase or sell or otherwise dispose of property for and on behalf of a municipality. Officers or agents appointed by the State are State officers and agents.

Board of Park Com. v. Detroit, 28 Mich., 248.

Hubbard v. Springwells, 25 Mich., 154, 155.

It would seem to us that there must have been some ulterior motive actuating some one in thus robbing the people of this commu-

nity of the last vestige of the right of local self-government. This is not all.

Section 9 of the act fixes forever, unless changed by legislative enactment, the location of the Central School Building of this district. Absolutely no discretion is left to the district. It must have this one place, and as if to make it entirely beyond question, the act provides what classes must be heard in this building. If these provisions do not deprive this municipality of the right of local self-government, we would like to have counsel for respondents point out some way in which it could be accomplished. If there was not an ulterior motive which actuated the enactment of this statute, the circumstantial evidence is very deceptive. These latter provisions prove conclusively the reason for making the appointment of the officers permanent, instead of provisional. Had they been provisional, there would have been no time in which to dispose of all the property belonging to the old districts and get it permanently fixed in the Village of Jerome before the people interested could have a voice in the matter. By making these appointmnts permanent, there would be nearly three years to accomplish the purpose, and it would be nearly two years before the people, by any possibility, could control the board of trustees. Thus it shows the legislative intention in the passing of this act. It was not to benefit the people generally of these old districts, but to further the interests of the people of the Village of Jerome.

They did not propose to let the people outside of the village have anything to say about the matter until they had gotten everything securely fixed. They did not propose to leave the matter so that it could be changed by local officers or local influence. They had everything nailed down solid by legislative enactment, so that the only way to change it was by like legislative act.

In order to further serve the interests of the Village of Jerome, and make sure that the people outside of that place should have absolutely no voice in the matter, five of the six trustees are appointed from the residents of the Village of Jerome.

As an additional proof that the passage of the act was actuated by an ulterior motive, we have but to consult the general school law, which provides that these school districts, by a vote of the taxpayers or voters, might unite and consolidate the old districts into a new district, to be operated under the graded school law, if such consolidation was wished and desired by the several municipalities. But it is apparent that the people of the Village of Jerome did not dare trust the people of these several school districts in the management

of their local affairs. The only other way to bring about this matter was by special legislative act which would entirely remove the matter from the control of those concerned.

We therefore contend that this act is absolutely void as contravening the provisions of the Constitution of the United States, which says that "No State shall * * * pass any * * * law impairing the obligation of contracts."

This act absolutely deprives the people of these old districts of the right of local self-government and of their property without due process of law or just compensation. And, to use the language of Mr. Justice Story in the Dartmouth College case, from the very nature of our government the public faith is pledged to give and preserve to municipal corporations the right of local self-government—the power to select their own officers, the power to acquire and control property, and the power to manage their local affairs—and that pledge is a compact, and that compact is subject only to judicial inquiry, construction and abrogation.

All of which is respectfully submitted.

FRANK A. LYON,
Attorney for Plaintiffs in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
MAY 27 1905
JAMES H. McKENNEY,
Clerk

No. 248. 21.

NO. 19,330

SUPREME COURT OF THE UNITED STATES

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN, EX REL. L. E. KIES, ET AL,
Plaintiff in Error.

vs.

THOMAS J. LOWERY, ET AL,
Defendants in Error.

MOTION TO DISMISS.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION.

FRANK A. LYON,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN, EX REL. L. E. KIES, ET AL,
Plaintiff in Error.

vs.

THOMAS J. LOWERY, ET AL,
Defendants in Error.

Motion to Dismiss Writ of Error.

BRIEF OF PLAINTIFF IN ERROR OPPOSING MOTION TO DISMISS WRIT OF ERROR.

Defendants in Error ask to have the writ of error in this case dismissed for two reasons :

1. Because, as is alleged, the record does not show that the repugnancy of the act in question to the Constitution of the United States was drawn in question in the Supreme Court of the State of Michigan.

2. Because as is alleged, the record in the case does not disclose that the Supreme Court of Michigan decided that the act was not repugnant to the Constitution of the United States.

Brief, page 1.

I.

DOES THE RECORD SHOW THAT THE REPUGNANCY OF THE ACT IN QUESTION TO THE CONSTITUTION OF THE UNITED STATES WAS DRAWN IN QUESTION IN THE SUPREME COURT OF THE STATE OF MICHIGAN ?

Referring to the plea filed by respondents in the Circuit

Court for the County of Hillsdale, (Record, page 11) we find that they justified under the Act in question and alleged that "the legislature of this state (Michigan) duly and lawfully passed" the Act in question.

Thereupon the relator filed his Replication to respondents' plea and therein alleged that said Act "is unconstitutional and confers upon said pretended school district attempted to be created thereby, and its pretended officers and pretended board of trustees no authority to act in the premises".

Record, page 12, paragraph I.

This specification would have been sufficient to have raised each and every question going to the validity of this act, whether because of repugnancy to the Constitution of the United States or otherwise.

Not resting on this, however, but wishing to be entirely fair with the respondents, the relator went into detail and preferred twenty-two specifications why said act was claimed to be void. Among these which raise definitely the questions here insisted upon as being repugnant to the Constitution of the United States are the following:

The twelfth, which says that the act deprives the inhabitants so left out of the new district of their property, without due process of law and without their consent.

The fourteenth, which alleges that the act in question confers upon the trustees named in the act, the right to confiscate the property of the old school districts and to dispose of the same without accounting to the old school districts for any part or parcel thereof. This is substantially the same as the twelfth, except that it is broader.

The fifteenth. which alleges that the legislature provided for the sale of the real estate belonging to the old school districts and directed that the proceeds thereof should be given to the new district. This is taking the property of the old districts without due process of law and without just compensation, and without the consent of the old districts.

The seventeenth, which alleged that the act attempts to take from the old districts their property "without the consent of said districts, or of the inhabitants, taxpayers or voters thereof, and without just compensation and without due process of law". This covers the same ground as those previously mentioned.

The eighteenth, which alleges that the act is void as de-

priving the inhabitants, tax payers and voters of the old districts and the new district of the right of local self-government. This as will be seen by a reference to our brief on the main part of the case, is involved in the contract clause of the Constitution.

Counsel for the respondents contends that these specifications must be held to refer to the Constitution of the State of Michigan and not to the Constitution of the United States. This might be true if these specifications were all there was in the record to determine what points and claims were involved. What we contend for, however, is that these specifications were broad enough to admit of the claims which we make under the Constitution of the United States, and that there is nothing to show that they were not made in the Circuit Court of the County of Hillsdale. Although it can have no bearing, yet, lest this court may assume from what has been said by respondents' counsel, in his brief on page 4, that no federal question was raised in that Court, we wish to say that these same claims were made and argued at length in that court. This however, is a writ of error to review the action of the Supreme Court and not the Circuit Court and so the point is only important, in that it shows that the pleadings were sufficiently broad to permit the claims to be made in the Supreme Court.

The opinion of the Supreme Court of Michigan, is found in the record as exhibit K, pages 43 to 53, inclusive, and is also found in 131 Mich. 639.

We have a right here to consult that opinion to ascertain what points were made and considered by that court.

Murdock vs. Memphis, 20 Wall. 590–633.
McManus vs. O'Sullivan, 91 U. S. 578.
Gross vs. U. S. Mortgage Co. 108 U. S. 481-487.
Adams Co. vs. Burlington & M. R. R. 112 U. S. 123 129.
Detroit City R. Co. vs. Guthard, 114 U. S. 133-137.
Jacks vs. Helena 115 U. S. 283.
Philadelphia Fire Asso. vs. New York, 119 U. S. 110.
Kreiger vs. Shelby R. R. Co. 125 U. S. 39-46.

But it is contended by counsel for defendants in error:

1. That the opinion of the Supreme Court of the State of Michigan, is no part of the record, and cannot be considered by this court in determining what questions were considered by that court, and

2. That the *Supreme Court* never rendered any opinion in the case.

Brief on Motion, page 5.
Brief on Main Case, page 9 and 10.

By section 25 of the Judiciary Act of 1789, it was provided that where a case was brought to this court by appeal from or writ of error to the Supreme Court of any State, no other error should be assigned or regarded as a ground of reversal of the case, than such as should appear "on the face of the record."

Under that act this court uniformly held that the opinion of the Supreme Court of the State could not be considered except in cases brought up from the Supreme Court of Louisiana, where such opinions were required to be spread at large by the clerk upon the records of that court, and thus became a part of the record.

In 1867, Congress passed an act, section two of which has since become section 709 of the Revised Statues, and has superceded section 25 of the Judiciary Act of 1789. Section 709 as it now stands and as it was passed in 1867, omitted the provision of the act of 1789, prohibiting the consideration of any errors other than such as shall be assigned and appear on the face of the record.

The effect of this change was considered at great length in the case of Murdock vs. City of Memphis, 20 Wall. 590, and in delivering the opinion in that case, Mr. Justice Miller, at page 633, said:—

"It is probable that, in determining whether one of "those questions (Federal Questions)was actually raised "and decided in the State Court, this court has been "inclined to restrict its inquiries too much by this ex "press limitation of the inquiry 'to the face of the "record.' What was the record of a case was pretty "well understood as a common law phrase at the time "that statute was enacted. But the statutes of the "states and new modes of proceedings in those courts "have changed and confused the matter very much "since that time.

"It is in reference to one of the necessities thus "brought about that this court long since determined "to consider as a part of the record the opinions de- "livered in such cases by the Supreme Court of Louis- "iana. And though we have repeatedly decided that "the opinions of other state courts cannot be looked "into to ascertain what was decided, *we see no reason* "*why, since this restriction is removed, we should not examine*

"those opinions, when properly authenticated, as may be "useful in determining that question."

The only reason for considering the opinions of the Supreme Court of Louisiana under the provisions of the Judiciary Act of 1789, was the fact that by the laws of that state those opinions were required to be entered at large upon the record. This provision of law did not obtain in many of the other states. This being true, it follows as a matter of course that the reasons for the rule of not considering the opinions of the state courts having been removed the rule itself must have been abrogated. And this is exactly what this court held in the case of Murdock vs. City of Memphis, *supra*. We therefore contend that in the light of the authorities above cited this court may consider the opinion of the Supreme Court of Michigan in determining what questions were considered and determined by that court.

Had the laws of Michigan required those opinions to have been spread at large on the face of the record, they might have been considered by this court under section 25 of the Judiciary Act of 1789, and by the removing of the limitation contained in that act, they can now be considered whether required to be recorded at length or not. But by the Constitution of Michigan, it is provided that the opinions of the Supreme Court shall be in writing, signed by the judges concurring therein, and filed by the clerk of that court. It also requires those dissenting from such opinion to give his reasons therefor in writing and file the same with the clerk. These in effect make these opinions a matter of record and have all the force and effect of a record, even though the other rule still obtained, which we deny.

Constitution of Michigan, Article 6, Section 10.

But counsel says that granting this to be true, the Supreme Court of Michigan never rendered an opinion in the case and therefore there is nothing of this character to be considered.

The Supreme Court of Michigan at that time consisted of five judges, Mr. Justice Hooker wrote the majority opinion; this was concurred in by Mr. Justice Montgomery, and Mr. Justice Moore concurred in the result. Mr. Justice Long did not sit, and Mr. Justice Grant filed a dissenting opinion.

Exhibit K, Record pages 43 to 53, inclusive, and 131 Mich. 639.

Counsel says that because Mr. Justice Moore concurred in the result on the authority of Moreland vs. Millen, 126 Mich., 381, and because only one question involved in this case was involved in the case of Moreland vs. Millen, therefore there was no concurrence in the opinion of Mr. Justice Hooker and the only point decided was the one concerning the appointment by legislative enactment of municipal officers for other than provisional terms.

This cannot be true for the very sufficient reason that every point necessarily involved in the decision of the case must be determined by the court, else there must be an affirmance of the decision of the lower court. Counsel has failed to keep in mind the difference between the decision and the opinion of the court. The decision of the court is its judgment, while the opinion is simply the reasons given for that judgment.

Houston vs. Williams, 13 Cal., 27.

The decision of the court in this case was that the act in question was "*duly and lawfully*" passed by the legislature. In order to so hold it was incumbent upon that court to decide all of the questions raised against the valdity of that act. The one ruled by Moreland vs. Millen was only one of the many questions involved and urged against the valdity of this act. Mr. Justice Moore concurring in the result of the opinion of Mr Justice Hooker, because of the decision in the case of Moreland vs. Millen, must of necessity have agreed with that opinion on all questions except those involved in the case of Moreland vs. Millen.

When we look at that case we find that Mr. Justice Moore there filed a dissenting opinion on the question there under consideration, and gave his reasons therefor at great length. But there being a majority of the court concurring in the majority opinion, that opinion became the opinion of the court and binding for all time. For this reason, and that alone, Mr. Justice Moore concurred in the result in this case.

Had that question been the only one concurred in by Judge Moore, it would have left the other questions undecided, and therefore the decision of the lower court must have stood because on an equal uivision the decision of the lower court is affirmed while this case was reversed.

Let us then look into the opinions filed in this case and see if it there appears that a federal question was raised or necessarily involved. On page 44 of the record Mr. Justice Hooker says:

"Counsel for relator attack the validity of this legis-
"lation. Their brief states the points thus:
"First. It deprives this school district or municipality
"of the right of local self-government, guaranteed to
"all municipalities by the constitution.

* * * * * * * * * *

"Fourth. The act as passed impairs the obligation of
"contracts, within the meaning of the Constitution of
"the United States," etc.

Our contention was and is that the last, or fourth, point includes the first point, and Mr. Justice Hooker although he starts out with the consideration of the question "Does this act impair the right of local self-government?" still he proceeds to the consideration of both of these questions at one and the same time, and discussés them together as will be seen by examining the opinion filed by him.

On page 49 of the record, he says:—

"We have already shown that the obligation of con-
"tracts is not impaired. The districts did not hold thiis
"property under any contract with the state, but as a
"public agency."

When had he "already shown that the obligation of "contracts is not impaired." And when had he shown that "The districts did not hold this property under "any contract with the state"?

Why, clearly when he was discussing the questions involved, and which he had discussed under the one heading of "Does this act impair the right of local self-government"?

The conclusions which are reached by Mr. Justice Hooker are that school districts, counties and townships have no rights which may be called private; that the property held by these "*quasi corporations*," as he calls them, is in no sense private property, but is public property, devoted to the purposes of the state, for the general good, just as alms-houses and c ourt houses are; and that the state may make such disposition of it as it sees fit. Also that there is no contract relation existing between these corporations and the state; that the districts did not hold this property under any contract with the state; and that the act did not impair the obligation of contracts, none of which were ruled by Moreland vs. Millen. By concurring in the *result*, Mr. Justice Moore concurred in the holding

of Mr. Justice Hooker and Mr. Justice Montgomery upon the questions.

If this is not a specific claim that this act is repugnant to the Constitution of the United States, we are at a loss to see how such question could be raised.

But counsel claims that because relator said in his brief that this act impaired the obligation of contracts within the meaning of the Constitution of the United States, "and of the State of Michigan" it must be presumed that when Mr. Justice Hooker decided that the act did not impair the obligation of contracts, he only had reference to the Constitution of the State.

Why did he have that in mind any more than the other? We fail to see. The Constitution of the United States was mentioned first and certainly the claim was not so long as to make him forget this part of it. It seems to us that it cannot be said that we waived the claim that this act was in violation of the federal Constitution by simply adding that it was in violation of the state constitution also. This was simply an additional reason why the act was void.

What we have said under this head also shows that the Supreme Court of the State of Michigan did decide that the act in question was not repugnant to the Constitution of the United States, and needs no further discussion. We therefore contend that the motion to dismiss the writ of error should be over ruled.

FRANK A. LYON,

Attorney for Plaintiff in Error.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 248. 21.

Office Supreme Court U. S.
FILED
APR 24 1905
JAMES H. McKENNEY,
Clerk.

THE ATTORNEY-GENERAL OF THE STATE OF MICHIGAN *in re* L. E. KIES *et al.*,
Plaintiff in Error.

vs.

THOMAS J. LOWREY *et al.*,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

HENRY B. GRAVES,
For Defendants in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1905.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 248.

THE ATTORNEY-GENERAL OF THE STATE OF MICHIGAN *in re* L. E. KIES *et al.*,
Plaintiff in Error.

vs.

THOMAS J. LOWREY *et al.*,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

We cannot accept the statement of facts of counsel for plaintiff in error as either complete or entirely accurate, and we therefore as compelled by the rule of this court (Rule 21), to point out the omissions and inaccuracies.

Counsel's statement regarding the school legislation of Michigan, including his resume of Act No. 315 of the Local Acts of Michigan for the year 1901, which act is the statute attacked in this case, is substantially correct, although most of it is superfluous in our view of the case. We therefore pass down to the middle of page 6 in counsel's brief, where he describes the institution and prosecution of the present case. We think a fuller statement of the pleadings, issues and questions raised should be made, inasmuch as we propose to challenge the jurisdiction of this court.

The Attorney-General of Michigan, who is plaintiff in error here, upon the relation of certain individuals, whose residence or interest in the question is not stated, brought quo warranto against the persons who were named by Act No. 315 of the Local Acts of Michigan for the year 1901 as the first trustees, officers and school inspectors of the new school district created by this act and known as "The public schools of the Village of Jerome," alleging that these persons held, usurped and intruded into and claimed to hold and exercise a false, fictitious and pretended public office, and also unlawfully claimed to have and exercise the powers and duties of school inspectors (Rec., 8-9, Exhibit B).

The respondents, who are defendants in error here, in their plea admitted that they claimed to hold the offices in question and justified under Act No. 315 aforesaid, alleging that the Legislature of the State of Michigan "duly and lawfully passed" the act, which upon approval by the Governor became and was a law in full force and effect. (Rec., 10-11, Exhibit C.)

Thereupon plaintiff filed a replication, which needs careful perusal and will be found on pages 12 to 16, both inclusive, of the printed record. This replication contained 22 allegations, all attacking the validity of the act in question.

The 1st is a mere averment that the act is "unconstitutional and void" without assigning reasons.

The 2nd and 20th simply aver that the provisions of the act are broader than the title.

The 3rd, 4th, 7th and a portion of the 10th aver that the act endeavors to create by special charter a school district with officers having enumerated powers, and at the same time keep the district under the provisions of the general laws of Michigan, which "can not constitutionally be done" and "can not be done under the constitution."

The 5th, 6th, 8th, 9th, 19th and the other portion of the 10th, aver that the act names the officers of the new district for definite terms and deprives the people of the district of the right of local self-government.

It is said in the respective paragraphs that this "can not be lawfully done, under the provisions of the constitution of the State of Michigan," and that local self-government "is a constitutional right of all municipalities in the State of Michigan," and that this "is unconstitutional in that it

deprives this district of the rights of local self-government, which is guaranteed under the constitution of this state;" and that this "deprives the inhabitants of local self-government and is therefore unconstitutional and void," and that the "act is unconstitutional and void" for the same reason.

The 11th simply avers that the act provides for the payment of salaries to the trustees.

A portion of the 12th avers that the act transfers to the newly created district the property of the old districts without providing for an equitable division of the property with that portion of the old districts not included in the new district, thus "depriving the inhabitants so left out of said new district of their property without due process of law and without their consent."

The 17th avers that the "act is unconstitutional and void in that it takes away * * * the property of said districts without the consent of said districts or of the inhabitants, taxpayers or voters thereof, and without just compensation and without due process of law."

The 21st and portions of the 12th and 16th aver that the act is repugnant to the general school laws, both statutory and constitutional, of Michigan.

The 14th, 15th, 18th and portions of the 13th and 16th aver that the act deprives the inhabitants, taxpayers and voters of the territory of local self-government and confers the right upon the trustees to confiscate the property of the old districts and dispose of the same for the benefit of the new district without an equitable division, and without the consent or voice of the inhabitants of the old districts, "thus depriving them of local self-government."

The 22nd finally avers that the act is unconstitutional and void in that it violates the letter and spirit of the constitution of the State of Michigan, and is beyond the legislative powers conferred by said constitution, and is inequitable and unjust in its provisions.

Respondents demurred generally to this replication (Rec., 16-17, Exhibit E), and the issues thus made were heard in the lower court.

On the argument there was stipulated into the record the description by sections of the territory of the old districts omitted from the new district, and it was thereupon agreed that the only question to be litigated was the "constitutionality" of the act in question (Rec., 19).

The trial judge, after a consideration of the case, announced his opinion that the act was "unconstitutional" and entered judgment of ouster (Rec., 20).

Thereupon respondents removed the case to the Supreme Court of Michigan by writ of error, assigning as errors simply that the lower court had held the act in question "unconstitutional," and had refused to hold the act "constitutional and valid" and had entered judgment of ouster (Rec., 20).

Only four of the five judges of the Supreme Court sat in the case (Rec., 49). An opinion was handed down by Mr. Justice Hooker, concurred in by Mr. Justice Montgomery, discussing the four points raised by counsel for plaintiff in attacking the validity of the act in question. These points were as follows:

"1st. It deprives this school district or municipality of the right of local self-government, guaranteed to all municipalities by the constitution.

2nd. The title to the act indicates and the act itself embraces more than one object.

3rd. The act is broader than the title, the body of the act embraces many objects not covered by the title.

4th. The act as passed impairs the obligation of contracts within the meaning of the Constitution of the United States and the Constitution of Michigan" (Rec., 44).

This opinion holds that school districts in Michigan are mere state agencies, created by legislative action, and that they are public corporations and their property is in no sense private property, but is public property devoted to the purposes of the State, for the general good, just as almshouses and court houses are, although confided to local management and applied to uses which are in a sense local, though in another sense general (Rec., 45). Upon the question of the impairment of contracts, this opinion simply says that there is no impairment, because the districts hold the property not under any contract with the State, but as a public agency (Rec., 49), Further, this opinion holds that it was beyond the power of the Legislature under the constitution of Michigan to name the first officers and trustees of the new district for fixed terms, following the precedent of the case of Moreland vs. Millen, 126 Mich., 381, but that this unconstitutional part of the act could be eliminated, leaving the remainder of the act to stand. Ac-

cordingly the judgment of ouster was affirmed as to those trustees and officers, who were named by the Legislature, and reversed as to all others. (Rec., 48-49-60-61).

Mr. Justice Moore concurred in the result, on the authority of Moreland vs. Millen, supra (Rec., 49).

Mr. Justice Grant dissented, holding that the act completely deprived the people of local self-government in many particulars besides that of naming the trustees and officers, and this violated the constitution of Michigan. He refused to discuss the other questions, and was of the opinion that the act was unconstitutional and void (Rec., 49 to 53, inclusive).

A motion for a re-hearing was made by the plaintiff and denied (Rec., 56-57-58-60).

Thereupon plaintiff sued out a writ of error to this court under the provisons of Sec. 709 of the Revised Statutes (Rec., 65-66).

There are nine assignments of error in this court, the substance of which is as follows (Rec., 64-65):

The 1st and 2nd assignments allege that the Supreme Court of Michigan erred in holding that the statute in question was not void as depriving the school districts of the right of self-government, which is styled in the 2nd assignment as a "constitutional right."

The 3rd assignment alleges that the Supreme Court of Michigan erred in holding "that the constitution of the United States and the constitution of the State of Michigan did not guarantee to school districts and other municipalities in the State of Michigan the right to local self-government."

The 4th assignment says it was error for the Supreme Court of Michigan to hold that the act in question "did not impair the obligation of contracts within the meaning of the constitution of the United States and the constitution of the State of Michigan."

The 5th assignment alleges that the Supreme Court of Michigan "erred in holding that the act was not void as taking away from the old school districts without the consent of said old school districts or of the inhabitants, taxpayers and voters thereof without just compensation and without due process of law." What was taken away is not named; but we presume it was property, inasmuch as in the 7th assignment it is alleged that the Supreme Court erred

in holding that the act was not void as in violation of the 14th Amendment to the constitution of the United States as depriving the old school districts and the inhabitants and taxpayers thereof, of their property without due compensation and due process of law.

The 6th assignment alleges that the Supreme Court of Michigan erred in holding that the act in question was not void as in violation of Article 1, Section 10, Subdivision 1, of the Constitution of the United States, also in violation of the provisions of Article IV., Section 43, of the Constitution of Michigan.

The 8th and 9th assignments simply aver that the Supreme Court of Michigan erred in holding that the act in question was valid and a constitutional exercise of legislative power and was not void as in violation of the Constitution of the United States.

We have made a full statement of the pleadings, issues and questions raised, because we are not only compelled to controvert some portions of counsel's statement of facts contained on pages 6 and 7 of his brief, but we also desire to raise other questions which demand a full statement of facts.

We think counsel is mistaken when he says on page 7 of his brief that he contended in the courts below that the act in question was unconstitutional within the meaning of the 14th Amendment of the Constitution of the United States.

We think counsel is mistaken when he says on page 7 of his brief that the opinion of Mr. Justice Hooker of the Supreme Court of Michigan was concurred in by a majority of the court.

We think counsel is mistaken when he says on page 7 of his brief that the opinion of Mr. Justice Hooker of the Supreme Court holds that the old districts were not deprived of their property without due process of law.

We will discuss these propositions in our argument because they are really questions of law. And we will conclude our statement of facts by remarking that although the briefs of counsel for plaintiff in the court below are printed in full in the printed record, the briefs of counsel for respondent are *not* printed in full. However, this is immaterial, as these briefs are in no sense part of the record, and we understand that this court will ignore them.

ARGUMENT.

We have grave doubts of the jurisdiction of this court and that is the first question to be determined.

The case is in this court by writ of error to the Supreme Court of Michigan under the provisions of Sec. 709 of the Revised Statutes of the United States; and the jurisdiction of this court rests on the question whether or not the validity of Act 315 of the Local Acts of Michigan for the year 1901 was drawn in question on the ground of its repugnancy to the Constitution of the United States, and the Supreme Court of Michigan decided that the act was not so repugnant.

It is apparent that no such question was raised in the Circuit Court of Hillsdale County, Michigan, where the case was commenced, the issues framed, and the cause first heard. The replication of plaintiff in error stated 22 reasons why the act was unconstitutional and the Constitution of the United States is not referred to once (Rec., 12 to 16, Exhibit D). Repeated references are made to the Constitution of Michigan. Many times the epithets "unconstitutional and void" are applied to the act, but the presumption of law in all such cases is that the Constitution of Michigan and not the Constitution of the United States was invoked.

Porter vs. Foley, 24 *Howard,* 415.
Kansas Endowment Asso. vs. Kansas, 120 *U. S.,* 103.
Miller vs. Cornwall R. R. Co., 168 *U. S.,* 131.
Kipley vs. Illinois, 170 *U. S.,* 182-187.
Jacobi vs. Alabama, 187 *U. S.,* 133.

It may be argued that the language of the 12th and 17th paragraphs of the replication plainly refers to the Constitution of the United States. In the 12th paragraph it is said that the act in question, by leaving out part of the territory of the old districts in forming the new district and not providing for a division of the property, deprived "the inhabitants so left out of said new district of their property, without due process of law and without their consent." And in the 17th paragraph, it is said that the "act is unconstitutional and void in that it attempts to take away * * * the property of said districts without the

consent of said districts, or of the inhabitants, taxpayers or voters thereof, and without just compensation and without due process of law." Judging from the claim made in his brief at the top of pages 7 and 10, counsel evidently *now* intends to insist that this language refers to the 14th Amendment of the Constitution of the United States. But the Constitution of Michigan says,

Article VI., Sec. 32,

"No person shall be * * * deprived of life, liberty, or property without due process of law."

And the Constitution of Michigan likewise has ample provisions against the taking of private property without due compensation.

Article XV., Sec. 9,

reads as follows: "The property of no person shall be taken by any corporation for public use, without compensation being first made or secured, in such manner as may be prescribed by law."

Article XV., Section 15,

reads as follows: "Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders and actually paid or secured in the manner provided by law."

Article XVIII., Section 2,

reads as follows: "When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders, etc."

Article XVIII., Section 14,

reads as follows: "The property of no person shall be taken for public use without just compensation therefor, etc."

The presumption of law is very plain that the pleader who drafted the replication was referring, in using the above language, to the Constitution of Michigan and not to the Constitution of the United States.

Miller vs. Cornwall R. R. Co., 168 *U. S.*, 131.
Jacobi vs. Alabama, 187 *U. S.*, 133.

And this presumption of law works no hardship in this case, because a perusal of the whole replication conclusively shows that the pleader had his mind alone on the Constitution of Michigan. He refers to it continually. He calls it familiarly in one place, "the constitution" (Rec., 13). He neither cites nor quotes the Constitution of the United States.

So it results that when the circuit jujdge of Hillsdale County, Michigan, pronounced the statute "unconstitutional" (Rec., 20) he had solely in mind the Constitution of Michigan.

When the case was removed by defendants to the Supreme Court of Michigan by writ of error, no new issues were made. The assignments of error simply were that the Circuit Court of Hillsdale County, Michigan, erred in holding the act unconstitutional (Rec., 20). And this must mean unconstitutional under the Constitution of Michigan.

If this case had arisen prior to the decision by this court of the case of

Murdock vs. City of Memphis, 20 *Wallace*, 590,

the argument would end here. Because, prior to that case, this court was confined in its determination of the question of jurisdiction to the record in the court below, and the opinions of the court below were not part of the record, except the opinions of the Supreme Court of Louisiana. But this court has since decided that under the Act of Congress of 1867, in those states where by law the opinions of the courts of last resort must be filed and spread at large upon the records as in Louisiana, Illinois and Washington, the opinions are a part of the record and may be examined to ascertain what was decided.

Gross vs. United States Mortgage Co., 108 *U. S.*, 477.
Sayward vs. Denny, 158 *U. S.*, 180.
Dibble vs. Bellingham Bay Land Co., 163 *U. S.*, 63.

But are the opinions of the Supreme Court of Michigan in this sense a part of the record? It is true that they must be in writing and be filed with the clerk.

Constitution of Michigan, Article VI., Sec. 10.

Sec. 213, 1 Compiled Laws Mich., 1897, reads as follows:

"The decisions of the Supreme Court, with the reasons therefor, shall be in writing, and signed by the judges concurring therein. Any judge dissenting therefrom shall give the reasons of such dissent in writing, under his signature; and such opinions shall be filed in the office of the clerk of the Supreme Court, where such opinions may have been delivered."

But this applies to dissenting opinions as well as to majority opinions. And moreover there is no provision, as there is in Illinois and Washington, requiring the opinions to be spread upon the records. So we raise the question whether the opinions of the Supreme Court of Michigan are a part of the record, so as to entitle them to be examined to ascertain what was decided.

However, a decision of this question is not necessary, because we contend that the Supreme Court of Michigan never promulgated any opinion in this case. It is true Mr. Justice Hooker wrote an opinion and Mr. Justice Montgomery concurred in that opinion (Rec. 49). But Mr. Justice Moore did not concur in that opinion. He only concurred in the *result* on the authority of Moreland vs. Millen, 126 Mich., 381 (Rec., 49). Mr. Justice Grant dissented (Rec., 49 to 53, inclusive). Mr. Justice Long did not sit (Rec., 49). So it results that of the five judges, which constituted the court, only four sat in the case; and two of five concurred in one opinion, another adopted the opinion of one earlier case as his opinion, and the fourth wrote a separate opinion. Neither a majority of the whole court nor a majority of those sitting in the case adopted any one opinion.

Therefore there is no opinion *of the court*. It requires a majority of judges sitting to concur in any opinion in order to make it the opinion of the court, although an order of affirmance will be entered if necessary in case of an equal division of the judges.

Lyon vs. Circuit Judge, 37 *Mich.*, 377.
Durant vs. Essex County, 7 *Wallace*, 107.
Boyle vs. Zacharie, 6 *Peters*, 348.

In this case, a majority of the judges did concur in ordering an affirmance as to the officers and trustees appointed by the Legislature, and a reversal as to the others,

but they concurred in *no opinion*. The situation is very similar to that ruled by the following cases:

City of Dubuque vs. Illinois Central R. R., 39 *Iowa*, 56-77.
Whiting vs. Town of West Point, 88 *Va.*, 905-911.
Re Griel, 171 *Pa. St.*, 412.

But it may be argued that inasmuch as two judges concurred in one opinion and another judge concurred in the result on the authority of an earlier opinion, the points where the opinion of the two judges agrees with the earlier opinion are points decided in this case. We accept the argument. Let us examine the opinions for such agreement.

The opinion written by Mr. Justice Hooker and concurred in by Mr. Justice Montgomery refers to four contentions of plaintiff as to the invalidity of the act in question. These are as follows:

1st. It deprives the school district or municipality of the right of local self-government, guaranteed to all municipalities by the constitution.

2nd. The title to the act indicates and the act itself embraces more than one object.

3rd. The act is broader than the title, the body of the act embraces many objects not covered by the title.

4th. The act as passed impairs the obligation of contracts, within the meaning of the Constitution of the United States and the Constitution of the State of Michigan (Rec., 44).

Manifestly only the last contention can be claimed to raise a Federal question. But it refers both to the prohibition against impairing the obligation of contracts in the Constitution of Michigan and the similar provision in the Constitution of the United States. The opinion disposes of this contention in a few words. All that is said is as follows:

"We have already shown that the obligation of contracts is not impaired. The districts did not hold this property under any contract with the State, but as a public agency" (Rec., 49).

But to which constitution does this language apply?

Article IV., Section 43,

of the Constitution of Michigan reads as follows: "The Legislature shall pass no bill of attainder, expost facto law, or law impairing the obligation of contracts."

Was Mr. Justice Hooker thinking of the prohibition against the impairment of contracts in the constitution of his own state or the provision in the Constitution of the United States? No claim had been made in the court below of any breach of the Federal Constitution. So we have grave doubts whether Mr. Justice Hooker made any examination of the authorities bearing on the Federal question at all. But granting for the sake of argument that the opinion does decide that there was no impairment of the contract clause of the Federal Constitution, we will examine the case of Moreland vs. Millen, 126 Mich., 381, upon which Mr. Justice Moore rests his concurrence in the result, and see whether any Federal question was there raised on the contract clause in the Federal Constitution. We find that this case alone decides the first point raised by counsel and discussed in Mr. Justice Hooker's opinion, viz: that the appointment by the Legislature of local officers for longer than provisional terms is unconstitutional because it violates the right of local self-government conferred by the Constitution of Michigan. Not only is the Federal Constitution not referred to, but no question about the impairment of contract obligations is raised at all. It therefore follows that the only question decided by the Supreme Court of Michigan in the case at bar was that an appointment of local officers by the Legislature for longer than provisional terms was unconstitutional under the Constitution of Michigan, but that this unconstitutional feature of the law could be eliminated and the balance of the act could stand.

An examination of the dissenting opinion of Mr. Justice Grant shows that he refused to consider anything but the local self-government question under the Michigan Constitution (Rec., 49-53).

If a Federal question had been fairly raised in the Hillsdale Circuit Court and not abandoned when the case was removed to the Supreme Court of Michigan, but again presented and urged, there is no doubt that the Supreme Court of Michigan could not ignore the question and silently overrule it and thus deprive this court of jurisdiction.

Chicago Life In. Co. vs. Needles, 113 *U. S.,* 574.

Green Bay, etc., Co. vs. Patten, 172 *U. S.*, 58.
Erie R. R. Co. vs. Purdy, 185 *U. S.*, 148.

But we have seen from a perusal of the replication that the question of the impairment of contracts was not raised in any form in the Hillsdale Circuit Court. And, although two of the *judges* in the Supreme Court of Michigan discussed the question, the *court* never promulgated an opinion on the question and never decided it even silently.

Again, if this court should construe the language of the replication as raising the question of the taking of property without due process of law under the 14th Amendment, that question was clearly abandoned in the Supreme Court, as it is not even referred to either by counsel or in any of the opinions. There is nothing to prevent the abandonment in the court of last resort of a Federal question properly raised below.

Harding vs. Illinois, No. 61 on the present docket. Opinion handed down Dec. 19th, 1904.

The following is a resume of our argument on the proposition that there is no Federal question properly raised in this court:

1st. No Federal question was raised in the Hillsdale Circuit Court, all references being to the Constitution of Michigan.

Porter vs. Foley, 24 *Howard*, 415.
Kansas Endowment Association vs. Kansas, 120 *U. S.*, 103.
Miller vs. Cornwall R. R. Co., 168 *U. S.*, 131.
Kipley vs. Illinois, 170 *U. S.*, 182-187.
Jacobi vs. Alabama, 187 *U. S.*, 133.

2nd. If any Federal question was raised in the Hillsdale Circuit Court (which we deny), it was the question of the taking of property without due process of law.

3rd. The question of the impairment of contracts was not raised at all under either constitution in the Hillsdale Circuit Court.

4th. There is nothing in the judgment rendered in the Supreme Court of Michigan to indicate that any Federal question was involved or decided.

5th. It is doubtful, whether this court will examine the opinions of the judges of the Supreme Court of Michigan to

ascertain what was decided in that court, because it is doubtful whether such opinions are part of the record.

Murdock vs. City of Memphis, 20 *Wall.*, 590.
Gross vs. U. S. Mortgage Co., 108 *U. S.*, 477.
Sayward vs. Denny, 158 *U. S.*, 180.
Dibble vs. Bellingham, etc., 163 *U. S.*, 63.

6th. But if this court will examine the opinions of the Supreme Court of Michigan, no opinion of the Supreme Court of Michigan was ever rendered in this case, because no opinion was ever handed down concurred in by a majority of the judges sitting in the case.

City of Dubuque vs. Illinois Central R. R., 39 *Iowa*, 56-77.
Whiting vs. Town of West Point, 88 *Va.*, 905-911.
Re Griel, 171 *Pa. St.*, 412.
Lyon vs. Circuit Judge, 31 *Mich.*, 377.
Boyle vs. Zacharie, 6 *Peters*, 348.
Durant vs. Essex Co., 7 *Wall.*, 107.

8th. It is doubtful whether any Federal question was discussed by any of the judges in their opinions.

9th. The only possible Federal question discussed by any of the judges in their opinions is the question of the impairment of contracts, and only two of the judges refer to this question.

10th. Inasmuch as this question was not raised by the Hillsdale Circuit Court and was not passed on by a majority of the judges of the Supreme Court, it was not decided by the Supreme Court.

11th. If it can be said that the question of the taking of property without due process of law under the 14th Amendment was raised in the Hillsdale Circuit Court (which we deny), this question was abandoned in the Supreme Court of Michigan.

Harding vs. Illinois, No. 61 *October Term*, 1904.

We understand that the briefs of counsel in the court below are not part of the record, except possibly where referred to in the opinions.

Harding vs. Illinois, No. 61, *present docket, supra.*

We also understand that the burden is upon plaintiff in error to affirmatively show that the Supreme Court of Michigan decided a Federal question.

> *Chicago, etc., R. R. Co. vs. McGuire, No. 69 on present docket. Opinion handed down Jany. 3rd,* 1905.

We do not think counsel has sustained this burden, and we think, to use the language of the case last cited,

"This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted."

* * * * * *

Another question has occurred to us.

Is the plaintiff in error qualified to sue out a writ of error to this court? Only those persons having personal interests in the litigation can appeal to this court for a decision of Federal questions. Plaintiff is Attorney-General of Michigan (Rec., 1). His predecessor in office filed the information on the relation of certain individuals, viz: L. E. Kies, W. E. Alley, J. B. Strong and Stephen McClearly. These gentlemen are not shown to have any interest in the litigation at all. They are not even shown to be either residents of Michigan or property owners or taxpayers there (Rec., 8-9). Plaintiff in error, apparently merely as a state officer and not moved by any personal interest in the litigation or by any person having such personal interest, made a petition for the writ of error to this court (Rec., 1 to 4 inclusive). Can he do this? The fact that the State Court accepted jurisdiction is immaterial.

> *Smith vs. Indiana,* 191 *U. S.,* 138.

* * * * * * *

For the reasons previously advanced, we are very much of the opinion not only that there is no Federal question properly raised in this case, but that plaintiff in error is not qualified to raise such a question if it existed. Without intending to waive either contention (and the jurisdictional nature of the questions prohibits such a waiver), we will examine the one Federal question adverted to in counsel's briefs in the court below and in the opinions of the judges of that court.

It is claimed that Act 315 of the Local Acts of Michigan for the year 1901 impairs the obligation of contracts within

the meaning of the Constitution of the United States. (Rec., 44.)

Now, what contract has been impaired in its obligations? The school districts, which the act abolished, were *public* corporations.

Comp. Laws Mich., 1897, Vol. 2, Sec. 4652, reads as follows:

"Every school district organized in pursuance of this chapter * * * shall be a body corporate, and shall possess the usual powers of a corporation for public purposes, by the name and style of 'school district number. . .,' * * * and in that name shall be capable of suing and being sued, of contracting and being contracted with, and of holding such real and personal estate as is authorized to be purchased by the provisions of law, and of selling the same."

School districts have been called municipal corporations.

Belles vs. Burr, 76 *Mich.*, 1-11.
School District vs. Gage, 39 *Mich.*, 484.

But more properly, perhaps, they may be called quasi-municipal corporations, as they are styled in the opinion of Mr. Justice Hooker in this case. (Rec., 45.)

Amer. and Eng. Ency. Law, 2nd Ed., Vol. 25, page 31.
Bush vs. Shipman, 5 *Ill.*, 186.
People vs. Dupuyt, 71 *Ill.*, 651.
Littlewort vs. Davis, 50 *Miss.*, 403.
Johnson vs. Dole, 4 *N. H.*, 478.
Stroud vs. City of Stevens Point, 37 *Wis.*, 367.
Rawson vs. Spencer, 113 *Mass.*, 40-45.

However, we care not whether they are quasi-municipal corporations or full-fledged municipalities. They are certainly *public* corporations as distinguished from *private* corporations. The law creating them so styles them.

Comp. Laws Mich., 1897, *Vol.* 2, *Sec.* 4652, *supra.*

Their birth is the voluntary act of the legislature of Michigan, and they are sometimes unwilling to be born. They are created solely and simply to fulfill certain public functions. Now, it needs the citation of no authorities to sustain the proposition that the act of the State of Michigan creating them and laying upon them certain public

duties and arming them with the tools wherewith to perform these duties, to-wit: the taxing power and the right to hold property, etc., is not in itself a contract. The charter of a municipal corporation is in no sense a contract, and the property acquired by the municipality is not acquired by virtue of any contract with the creator of the municipality.

Dartmouth College vs. Woodward, 4 *Wheat.,* 518.
East Hartford vs. Hartford Bridge Co., 10 *Howard,* 511.
Aspinwall vs. Commissioners, 22 *Howard,* 364.

The State of Michigan never made any *contract* with the abolished school districts or the inhabitants thereof concerning the property of the districts. Therefore the act of the State of Michigan abolishing the districts and disposing of their property violated no contract with the State.

Neither does the record disclose or counsel claim that the act in question impaired the obligation of any contract between the school districts and third persons. If the school districts held any property by private grant in trust for some limited purposes, it is conceivable that the act might impair the contract incident to the grant. But the record makes no mention of any such property. It is certainly incumbent upon plaintiff to make good such a claim.

So we repeat there is no cotnract in existence in this case, the obligations of which have been impaired by the act in question.

The fact is, we think, that the burden of counsel's plaint is misdirected. What he is really complaining of is that the act in question deprives the school-districts and the inhabitants thereof of their property without their consent and without due process of law in violation of the 14th Amendment. That is another question. But, inasmuch as counsel did not present this question to the Supreme Court of Michigan, and that court neither decided nor had the opportunity of deciding it, we do not intend to examine it here at length. We will merely remark in passing that this court has very lately carefully discussed the nature of municipal corporations.

Worcester vs. Worcester Consolidated Street R. R. Co., October Term, 1904. *Opinion Feb. 20th,* 1905.

It is there pointed out that municipal corporations are

mere creatures of the State, brought into existence to perform for the State certain public functions. The property of municipal corporations, as we remarked before, is simply the tools which the State authorizes the municipalities to acquire wherewith to perform these public functions. In some cases municipalities may acquire *private* property incidental to the performance of their public functions. Such property is usually received by grant from the bounty of public-spirited citizens, and in such case it is beyond the power of the State to divert the grant or deprive the inhabitants of the municipality of the subject of the grant without due process of law. This distinction is carefully pointed out in

Worcester vs. Worcester Consolidated Street R. Co., supra.

And the older decisions of this court are there reviewed.

East Hartford vs. Hartford Bridge Co., 10 *Howard*, 511.
U. S. vs. Baltimore & Ohio R. R. Co., 17 *Wall.*, 322.
Laramie Co. vs. Albany Co., 92 *U. S.*, 307.
Commissioners of Tippicanoe Co. vs. Lucas, 93 *U. S.*, 108.
Mt. Pleasant vs. Beckwith, 100 *U. S.*, 514.
New Orleans vs. New Orleans Waterworks Co., 142 *U. S.*, 79.

See also:

Newton vs. Commissioners, 100 *U. S.*, 548.
Essex Public Road Board vs. Skinkle, 140 *U. S.*, 334.
Mt. Hope Cemetery vs. Boston, 158 *Mass.*, 509.
Whitney vs. Stow, 111 *Mass.*, 368.

This is a school-district case.

In the two Wisconsin cases cited by counsel,

Town of Milwaukee vs. City of Milwaukee, 12 *Wis.*, 93;

State vs. Haben, 22 *Wis.*, 660,

we have in the one case private property held by the Town of Milwaukee in trust, diverted by the legislature from the purpose of the trust; and in the other case, money raised by taxation for one purpose diverted by the legislature to another purpose, when the legislature was powerless to

impose a tax for the purpose to which the money was diverted.

But it is needless to prolong this academic discussion on the question of the 14th Amendment. By no possible stretch of construction is this question entitled to a decision in this case.

And at this point it is proper to remark that the very first question, which counsel announces he proposes to raise and discuss in this court, is a novelty in the case. Counsel says that the act in question violates Article IV., Sec. 4, of the Constitution of the United States, which provides that the United States shall guarantee to every State a republican form of government. (Brief, 10.) We can find no such question anywhere in the record, and we would not understand its relevancy if it were there.

We finally pass to one question, which we think must dispose of the case, if it is not disposed of on jurisdictional grounds. The burden of plaintiff's complaint is that the portions of the old districts omitted from the new district have lost their property without their consent and without compensation.

Is there anything in the record to indicate that the omitted portions contained any of the property? Nothing at all.

Is there anything in the record to indicate that the inhabitants of the omitted portions ever contributed one cent, either by taxation or otherwise, towards the acquisition of the property? Nothing at all. For aught the record discloses, the omitted portions may have been added to the other portions less than a day before the act in question was passed and before they paid a dollar of tax.

Is there anything in the record to indicate the nature of the property of the old districts, whether it was public or private? Nothing at all.

Is there anything in the record to indicate that the debts of the old districts did not exceed the value of the property? Nothing at all. The new districts not only took the property, but also the debts of the old districts. The separation may have been a blessing to the inhabitants of the old districts. The record does not disclose the residence of relators. Perhaps they are taxpayers of the new district, complaining because they are saddled with debts in excess of the property received.

In the absence of any showing, is this court going to presume that the legislature acted unjustly and did not make a fair apportionment? Can this court presume error?

We conclude with a resume of our argument on the last features of the case.

1st. The abolished school-districts were public corporations, and neither owed their existence nor held their property through any contract with the State.

Comp. Laws of Mich., 1897, *Vol.* 2, *Sec.* 4652, *supra.*
Rawson vs. Spencer, 113 *Mass.*, 40-45.
Dartmouth College vs. Woodward, 4 *Wheat.*, 518.
East Hartford vs. Hartford Bridge Co., 10 *Howard*, 511.
Aspinwall vs. Commissioners, 22 *Howard*, 364.
U. S. vs. Baltimore & Ohio R. R. Co., 17 *Wallace*, 322.
Laramie Co. vs. Albany Co., 92 *U. S.*, 307.
Commissioners of Tippicanoe vs. Lucas, 93 *U. S.*, 108.
Mt. Pleasant vs. Beckwith, 100 *U. S.*, 514.
Newton vs. Commissioners, 100 *U. S.*, 548.
Essex Public Road Board vs. Skinkle, 140 *U. S.*, 334.
Worcester vs. Worcester Consolidated Street R. Co., October Term, 1904. *Opinion Feb. 20th*, 1905.

2nd. There is no showing of any property held by the abolished districts pursuant to any contract with third persons.

For these two reasons there is no showing of any contract to be impaired.

3rd. The question of the 14th Amendment is not in this case. But if it were, it would seem that there is no showing of any *private* property held by the districts, which the legislature could not touch without the consent of the inhabitants of the districts and without due process of law.

4th. There is nothing in the record to indicate the diversion of any property or the unfair apportionment of property.

We think the writ of error should be dismissed for want of jurisdiction, and, failing that, the judgment of the court below should be affirmed with costs.

HENRY B. GRAVES,
Attorney for Defendants.

FILE COPY.

No. 19,330.

Supreme Court U. S.
FILED
MAY 8 1905
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States

THE ATTORNEY-GENERAL OF THE STATE OF MICHIGAN, ex rel. L. H. KIRK et al.,
Plaintiff in Error,
vs.
THOMAS J. LOWREY et al.,
Defendants in Error.

No. 242, 21.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION.

HENRY S. GRAVES,
For Defendants in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1905.

Supreme Court of the United States

THE ATTORNEY-GENERAL OF THE STATE OF MICHIGAN, ex rel. L. E. KIES et al.,
Plaintiff in Error,
vs.
THOMAS J. LOWREY et al.,
Defendants in Error.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION.

And now come the defendants in error, by Henry B. Graves, their attorney, and move the Court that the writ of error in the above entitled cause be dismissed for the following reasons, viz:

1st. Because said writ of error was asked for and issued under the provisions of Section 709 of the Revised Statutes of the United States, upon the ground that a final judgment was rendered in the Supreme Court of Michigan, in a suit wherein was drawn in question the validity of Act No. 315 of the Local Acts of Michigan for the year 1901, on the ground that said act was repugnant to the Constitution of the United States, and the decision of said court was that said act was not so repugnant.

2nd. And because the record in the case does not disclose that the repugnancy of said act to the Constitution of the United States was drawn in question in the Supreme Court of Michigan.

3rd. And because the record in the case does not disclose that the Supreme Court of Michigan decided that the said act was not repugnant to the Constitution of the United States.

HENRY B. GRAVES,
Attorney for Defendants in Error.

ARGUMENT ON MOTION TO DISMISS.

We were favored with a copy of the printed record in this case at too late a date to permit the interposition of a motion to dismiss before the time when the case was reached upon the present docket. We accordingly prefaced our brief upon the merits with an argument for dismissal upon the ground that no Federal question was involved. Now that the case has been continued to the next term of court, we make a formal motion to dismiss, and support the motion with the following argument. At the same time we beg leave to refer the court to the more elaborate argument upon the same question to be found at the commencement of our brief already on file.

The Attorney-General of Michigan, who is plaintiff in error here, brought quo warranto in the Circuit Court of Hillsdale County, Michigan, against the persons who were named by Act No. 315 of the Local Acts of Michigan for the year 1901 as the first trustees, officers and school inspectors of the new school district created by the act and known as the "Public Schools of the Village of Jerome," alleging that these persons held, usurped and entered into and claimed to hold and exercise false, fictitious and pretended public offices, and also unlawfully claimed to have and exercise the powers and duties of school inspectors. (Rec., 8-9, Exhibit "B.")

The respondents, who are defendants in error here, in their plea admitted that they claimed to hold the offices in question and justified under Act 315 aforesaid, alleging that the Legislature of Michigan "duly and lawfully passed" the act, which, upon approval by the Governor, became and was a law in full force and effect. (Rec., 10-11, Exhibit "C.")

Plaintiff filed a replication, which needs careful perusal, and will be found on pages 12 to 16 of the printed record. This replication contained 22 allegations, attacking the validity of the act in question.

Respondents demurred generally to the replication (Rec. 16-17, Exhibit "E"), and the issues thus made were heard in the lower court.

On the argument there was stipulated into the record the description by sections of the territory of the old school districts omitted from the new district, and it was thereupon agreed that the only question to be litigated was the "constitutionality" of the act in question. (Rec., 19.)

It will thus be seen that the sole question raised in the court of original jurisdiction was the "constitutionality" of the act in question. But what constitution was referred to? An examination of the replication (Rec., 12 to 16) shows repeated references in terms to the Constitution of Michigan. The familiar terms "under the constitution" are used at least once. (Rec., 13.) The epithets "unconstitutional and void" are quite frequent. *Not once* is the Constitution of the United States named. But it may be argued that the Constitution of the United States was quoted or paraphrased if not cited. Judging from the claims made in his brief at the top of pages 7 and 10, counsel evidently *now* intends to insist that the language of the 12th and 17th paragraphs of the replication refers to the 14th Amendment to the Constitution of the United States. In the 12th paragraph it is said that the act in question, by leaving out part of the territory of the old districts in forming the new district and not providing for a division of the property, deprived "the inhabitants so left out of said new district of their property without due process of law, and without their consent." (Rec., 14.) And in the 17th paragraph it is said that the "act is unconstitutional and void in that it attempts to take away * * * the property of said districts without the consent of said districts, or of the inhabitants, taxpayers or voters thereof, and without just compensation and without due process of law."

But the Constitution of Michigan says,

Article VI., Sec. 32,

"No person shall be * * * deprived of life, liberty, or property without due process of law."

And the Constitution of Michigan likewise has ample provisions against the taking of private property without due compensation.

Article XV., Sec. 9,

reads as follows: "The property of no person shall be taken by any corporation for public use, without compensation being first made or secured, in such manner as may be prescribed by law."

Article XV., Section 15,

reads as follows: "Private property shall not be taken for public improvements in cities and villages without the

consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders and actually paid or secured in the manner provided by law."

Article XVIII., Section 2,

reads as follows: "When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders," etc.

Article XVIII., Section 14,

reads as follows: "The property of no person shall be taken for public use without just compensation therefor," etc.

It is therefore plain, both on principle and authority, that the pleader who drafted the replication, and the lawyers who argued the case in the lower court, and the judge of that court who later decided that the statute was unconstitutional (Rec., 20) had solely in mind the Constitution of Michigan.

Porter vs. Folcy, 24 *Howard*, 415.
Kansas Endowment Asso. vs. Kansas, 120 *U. S.*, 103.
Miller vs. Cornwall R. R. Co., 168 *U. S.*, 131.
Kipley vs. Illinois, 170 *U. S.*, 182-187.
Jacobi vs. Alabama, 187 *U. S.*, 133.

When the case was removed by the defendants in error to the Supreme Court of Michigan, no new issues were made. The assignments of error simply allege that the lower court erred in holding the act unconstitutional (Rec., 20). And this means unconstitutional under the Constitution of Michigan.

The judgment of the Supreme Court of Michigan affirmed the judgment of ouster entered in the lower court as to all the respondents who held office by virtue of the appointment of the Legislature, but reversed the judgment of ouster as to all the other respondents. (Rec., 61.) Thus, in effect, the Supreme Court of Michigan decided that the act violated the Constitution of Michigan so far as it appointed the local officers of the new school district created by the act, but that in all other respects the act was not repugnant to the Constitution of Michigan.

Therefore there was no Federal question decided on the record by the Supreme Court of Michigan.

But it is argued that since the Act of Congress of 1867 and the decision by this court of the case of

Murdock vs. City of Memphis, 20 *Wallace*, 590,

it is permissible to look into the opinion of the Supreme Court of Michigan to see whether that court did not decide some Federal question not otherwise apparent. We made the point in our brief on the merits that the opinions of the Supreme Court of Michigan are not required to be spread at large on the records of that court, and are therefore not really part of the record. Without waiving this point, it is needless to decide it, because the Supreme Court of Michigan never rendered any opinion in the case. Four judges sat in the case, Mr. Justice Long not sitting. (Rec., 49.) Mr. Justice Hooker handed down an opinion concurred in by Mr. Justice Montgomery, deciding certain questions and reaching the result that the judgment of ouster should be affirmed as to the officers holding by legislative appointment contained in the act, but reversed as to all others. (Rec., 49.) Mr. Justice Moore did not concur in this *opinion*, but concurred in the *result* on the authority of Moreland vs. Millen. 126 Mich., 381. (Rec., 49.) If we examine Moreland vs. Millen, 126 Mich., 381, we find that no Federal question was involved in that case at all; but that the only question involved or decided was that the Legislature has no power to appoint local offices for longer than provisional terms under the Constitution of Michigan. Mr. Justice Grant wrote a dissenting opinion, holding that not only the appointive feature of the act but the whole act violated the Constitution of Michigan. He expressly refused to decide any other questions. (Rec., 49-53.) We therefore have two of the judges concurring in one opinion; a third judge refusing to join in that opinion, but consenting to the judgment recommended by the other two; and the fourth judge wholely dissenting for reasons not involving any Federal question. Manifestly the court never promulgated any *opinion*, although it did enter a *judgment*.

City of Dubuque vs. Illinois Central R. R., 39 *Iowa*, 56-77.
Whiting vs. Town of West Point, 88 *Va.*, 905-911.
Re Griel, 171 *Pa. St.*, 412.
Boyle vs. Zacharie, 6 *Peters*, 348.
Durant vs. Essex Co., 7 *Wall.*, 107.

The record of the court below and the judgment entry in the Supreme Court can alone be invoked to ascertain what the Supreme Court decided.

Nevertheless, counsel undoubtedly contends that the opinion of Mr. Justice Hooker and Mr. Justice Montgomery may be examined to ascertain what was decided. We have already shown the fallacy of this contention. But if we examine that opinion, we find only one reference to a Federal question. It is stated in the opinion that counsel claims that the act "impairs the obligation of contracts, within the meaning of the Constitution of the United States and the Constitution of the State of Michigan." (Rec., 44.) All Mr. Justice Hooker says on this question is as follows:

"We have already shown that the obligation of contracts is not impaired. The districts did not hold this property under any contract with the State, but as a public agency." (Rec., 49.)

Now, the question of the impairment of the obligation of contracts was not raised in the court below at all. None of the 22 paragraphs of the replication refer to the question. (Rec., 12 to 16, Exhibit "D.") If this Federal question had been fairly raised in the court below and not abandoned in the Supreme Court of Michigan, but again presented and urged, there is no doubt that the Supreme Court of Michigan could not ignore the question and silently overrule it and thus deprive this court of jurisdiction.

Chicago Life Ins. Co. vs. Needles, 113 *U. S.*, 574.
Green Bay, etc., Co. vs. Patten, 172 *U. S.*, 58.
Erie R. R. Co. vs. Purdy, 185 *U. S.*, 148.

But, inasmuch as it was not raised in the lower court, we do not believe Mr. Justice Hooker gave it any consideration. We think that the language of his opinion above quoted refers to the impairment of the obligation of contracts under the Constitution of Michigan, which says:

Article IV., Sec. 43.

"The Legislature shall pass no bill of attainder, ex post facto law, or law impairing the obligation of contracts."

But it is needless to decide this question, because, as we remarked before, the opinion of Mr. Justice Hooker is not the opinion of the Court.

Finally, if this court should decide that the language of the 12th and 17th paragraphs of the replication (Rec., 14 and 15) fairly raised a Federal question under the 14th Amendment, despite the fact that the apt language and context are persuasive that the reference is to the Constitution of Michigan; still any contention under the 14th Amendment was abandoned in the Supreme Court of Michigan. There is no reference, directly or indirectly, in the opinions to such a question.

Harding vs. Illinois, No. 61, October Term, 1904. Opinion handed down Dec. 19th, 1904.

The following is a resume of our argument on the proposition that there is no Federal question properly raised in this court:

1st. No Federal question was raised in the Hillsdale Circuit Court, all references being to the Constitution of Michigan.

Porter vs. Foley, 24 *Howard*, 415.
Kansas Endowment Association vs. Kansas, 120 *U. S.*, 103.
Miller vs. Cornwall R. R. Co., 168 *U. S.*, 131.
Kipley vs. Illinois, 170 *U. S.*, 182-187.
Jacobi vs. Alabama, 187 *U. S.*, 133.

2nd. If any Federal question was raised in the Hillsdale Circuit Court (which we deny), it was the question of the taking of property without due process of law.

3rd. The question of the impairment of contracts was not raised at all under either constitution in the Hillsdale Circuit Court.

4th. There is nothing in the judgment rendered in the Supreme Court of Michigan to indicate that any Federal question was involved or decided.

5th. It is doubtful whether this court will examine the opinions of the judges of the Supreme Court of Michigan to ascertain what was decided in that court because it is doubtful whether such opinions are part of the record.

Murdock vs. City of Memphis, 20 *Wall.*, 590.
Gross vs. U. S. Mortgage Co., 108 *U. S.*, 477.
Sayward vs. Denny, 158 *U. S.*, 180.
Dibble vs. Bellingham, etc., 163 *U. S.*, 63

6th. But if this court will examine the opinions of the Supreme Court of Michigan, no opinion of the Supreme Court of Michigan was ever rendered in this case, because no opinion was ever handed down concurred in by a majority of the judges sitting in the case.

City of Dubuque vs. Illinois Central R. R., 39 *Iowa*, 56-77.
Whiting vs. Town of West Point, 88 *Va.*, 905-911.
Re Griel, 171 *Pa. St.*, 412.
Lyon vs. Circuit Judge, 37 *Mich.*, 377.
Boyle vs. Zacharie, 6 *Peters*, 348.
Durant vs. Essex Co., 7 *Wall.*, 107.

8th. It is doubtful whether any Federal question was discussed by any of the judges in their opinions.

9th. The only possible Federal question discussed by any of the judges in their opinions is the question of the impairment of contracts, and only two of the judges refer to this question.

10th. Inasmuch as this question was not raised in the Hillsdale Circuit Court and was not passed on by a majority of the judges of the Supreme Court, it was not decided by the Supreme Court.

11th. If it can be said that the question of the taking of property without due process of law under the 14th Amendment was raised in the Hillsdale Circuit Court (which we deny), this question was abandoned in the Supreme Court of Michigan

Harding vs. Illinois, No. 61 *October Term*, 1904.

We understand that the briefs of counsel in the court below are not part of the record, except possibly where referred to in the opinions.

Harding s. Illinois, No. 61, *present docket, supra.*

We also understand that the burden is on the plaintiff in error to affirmatively show that the Supreme Court of Michigan decided a Federal question.

Chicago, etc., R. R. Co. vs. McGuire, No. 69 *on present docket. Opinion handed down January 3rd*, 1905.

We do not think counsel has sustained this burden, and we think, to use the language of the case last cited,

"This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted."

We conclude by referring the court to a fuller argument on this question of jurisdiction embodied in the first 15 pages of our brief, already on file in this case.

We ask to have the writ of error dismissed with costs.

HENRY B. GRAVES,
For Defendants in Error.

Office Supreme Court U. S.
FILED
OCT 19 1905
JAMES H. McKENNEY,
Clerk.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. ~~215~~ 21.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN UPON THE RELATION OF L. E. KIES ET AL., *Plaintiff in Error.*

vs.

THOMAS J. LOWREY, H. S. WALWORTH, C. H. MANZER ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

F. H. STONE,
For Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 248.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN UPON THE RELATION OF L. E. KIES ET AL., *Plaintiff in Error.*

vs.

THOMAS J. LOWREY, H. S. WALWORTH, C. H. MANZER ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

F. H. STONE,

For Defendants in Error.

This is a proceeding to invoke the aid of the Federal Court to nullify an Act of the Legislature of the State of Michigan, notwithstanding the fact that the Supreme Court of the State of Michigan has held the same to be constitutional in its essential features.

It is to be regretted that after a full discussion of all the issues raised by the replication of Relator filed in the Circuit Court for Hillsdale County (both in the initial Court and in the Supreme Court, first on argument and regular briefs submitted and later on motion for a rehearing) the question of violation of the United States Constitution is, for the first time, squarely raised.

We shall not burden this Court with any additional arguments to those set forth by our Bro. Graves in his brief on this point.

We do submit, however, that if, as the Attorney for Plaintiff in error asserts in his brief,

"The relator contended that this act was unconstitutional and void for the following reasons, to-wit:

"*First*—That this act deprives the district created thereby, as well as the *old districts*, of the right of local self-government.

"*Second*—That the act in question was void within the provisions and meaning of the Constitution of the United States, which provides that no State shall pass a law impairing the obligation of contracts.

"*Third*—That the act in question was void because it deprived the old school districts of their property without just compensation or due process of law, within the meaning of the XVIth amendment to the Constitution of the United States."

See Brief for Relator, pages 6 and 7.

He should point out in the Record where such contention was urged in said Courts, and where the so-called federal question was called to the attention of Court or Counsel.

If such contention was had, it is passing strange that the full record prepared under direction of the same Attorney conclusively shows that this, our fourth effort in the line of argument to meet his contentions, should for the first time take up any question of the Constitution of the United States.

We urge this seriously, for we supposed that we had heretofore briefed and argued the entire case, but letting that pass, but not consenting, we desire to call the Court's attention to what we term

HISTORICAL.

It is certainly of interest, and we deem of value, as contributing toward a better understanding of the question before the Court, to give space to the history of education and "educational funds" in the State of Michigan.

Without dwelling on the fascinating pages of how the great "northwest territory" came to be ceded to the general government, and the consequences following such ceding, it is enough for this argument to call attention to the fact that the State of Michigan became a donee from the general government of a large and valuable part of said territory, but with the express stipulation that

> "There shall also be reserved the lot No. 16 of every township for the maintenance of public schools within said township."
>
> *See* Act of Congress May 20, 1785, commonly called ordinance of 1785.
>
> *Also*, Art. III of the ordinance of 1787.

We can do no better than to quote from the able report of the Superintendent of Public Instruction of the State of Michigan, where this subject of the origin and disposition and control of the school funds of the State of Michigan is taken up and discussed in all its branches:

> "RESERVATION OF SCHOOL LANDS.
>
> "The Act of Congress of 1804, making provision for the sale of lands in the Indiana Territory, comprising the present States of Indiana, Illinois, Michigan and Wisconsin, again reserved section 16 in every township for the support of schools.
>
> "It will be seen by these various provisions that the policy of giving public aid to the cause of education was steadfast and liberal.
>
> "It is evident, however, that the original design of Congress was to give section 16 for the benefit of education in the township only in which such section was situated. In the older States this had caused much difficulty and many complications, one of the chief reasons being that the section 16 in various townships differed greatly in value, some of them being sufficient to greatly aid the schools of the township, others being absolutely worthless. When Michigan sought admission to the Union she profited by the experience of some of her sister States, and believing that the interests of education were not local, but general, made

provision that the 16th section of each township should become the property of the State for the use of schools, and contribute not to the educational aid of any locality, but to the entire State.

"The language of the first State Constitution (of Michigan), adopted in 1835, is as follows:

" 'The proceeds of all lands that have been or hereafter may be granted by the United States to this State for the support of schools, which shall hereafter be sold or disposed of, shall be and remain a perpetual fund, the interest of which, together with the rents of all unsold lands, shall be inviolably appropriated to the support of schools throughout the State.'

"The 'perpetual fund' above mentioned was later named the Primary School Fund.

"The present State Constitution of 1850 did not materially change the above except by certain additions, the language of Sections 2 and 3, Article XIII, being as follows:

" 'Sec. 2. The proceeds from the sales of all lands that have been or may hereafter be granted by the United States to the State for educational purposes, and the proceeds of all lands or other property given by individuals or appropriated by the State for like purposes, which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the gift, grant or appropriation.

"Sec. 3. All lands, the titles to which shall fail from a defect of heirs, shall escheat to the State, and the interest on the clear proceeds from the sales thereof shall be appropriated exclusively to the support of primary schools.'

"The growth of this fund to its present proportions and the history of its aid to the thousands of common schools of this State are a splendid monument to the foresight, wisdom and educational zeal of the men who framed the Constitution of the State."

Report of the Superintendent of Public Instruction of Michigan, pages 18–19. for year 1903.

It will not be out of place, in view of the contention of Counsel, that the State has no control of or supervision of schools in the State of Michigan, to follow this subject a few steps further.

In 1850 Congress gave to the State of Michigan nearly 6,000,000 acres of what is commonly called "Swamp Lands."

In 1858 the Legislature of the State of Michigan enacted:

> "All monies heretofore received and all monies hereafter received from the sale of said Swamp Lands, donated by the aforesaid Act of Congress, after deducting expenses of sales, fifty per cent shall be denominated a primary school fund, and the interest thereof, at five per centum per annum, shall be appropriated and distribnted in like manner as the primary school (interest) fund of the State."

Section 5, Act No. 31, of the Session Laws of 1858, Michigan.

And this is substantially the law of the State at this time in relation to said fund.

Nor is this all.

Sec. 1 of Article XIV of the Constitution of the State of Michigan provides:

> "All specific taxes except those received from the mining companies of the upper peninsula shall be applied in paying the interest of the primary school, university and other educational funds and the interest and principal of the State debt in the order herein recited, until the extinguishment of the State debt, other than the amounts due to educational funds, when such specific taxes shall be added to and constitute a part of the primary school interest fund."

In 1881 the Supreme Court of Michigan held that the

"State debt" was fully provided for in a sinking fund made of unused accumulations of specific taxes and decreed that "any excess, apart from what shall be annually required to meet the annual interest accruing on the debt, must be held applicable under the Constitution, so long as there is no failure in the fund for the payment of the principal, to the primary school interest fund, and ought to be assigned thereto."

Auditor General, Relator, v. State Treasurer, 45 Michigan, page 161.

It may be added that by an amendment to the State Constitution, adopted in 1900, the Legislature is given power, which it has sought to enforce, to assess certain corporations according to their cash value, instead of collecting a specific tax upon them, but inasmuch as this matter is today unsettled and the right to assess is contested, we will not include this increased asset in the footing we shall now make showing the amounts realized and expended by the State of Michigan for primary schools through these "State agencies," which our Brother Lyon claims have no existence in the law:

The Primary School fund, with 46,975 acres of Primary School land remaining unsold, amounted July 1, 1903, to $4,193,642.40.

See Superintendent Report, Supra, page 20.

To this must be added the Swamp Land fund, amounting at same date to $919,365.70.

See Report, Supra, page 24.

The annual interest on these funds, the first at 7 per cent. and the latter at 5 per cent., together with specific taxes, has enabled the State of Michigan to distribute through these "agencies" to the primary schools of the State from 1842 to 1903, both inclusive, the sum of $28,106,409.22, the apportionment for the year 1903 being $1,973,784.94, or a per capita sum of $2.70 for each child of school age in the State.

See "Distribution of Primary Money Since 1842."

Report of Superintendent. Supra, page 30.

It has seemed to us to be germain to the issues raised by Attorney for plaintiff in error in this Court to go thus fully into the history and origin of school funds in Michigan, and to give the above totals, to avoid any confusion as to the manner in which schools are supported in this State, in part, from the revenues furnished and cared for by the State at large. Of course, admitting that in addition to these funds each district at its annual school meeting votes to raise by tax on the property of the district such further sum, if any be required, as it may deem necessary.

We submit that when properly understood, it will be seen that the primary schools of this state, are state and not local institutions, or as Mr. Justice Hooker says in the opinion filed in the Michigan Supreme Court and which is made a part of the record in this case, "the school district is a state agency" and that "the property of the district is in no sense private property, but is public property, devoted to the purposes of the state for the general good, just as almshouses and court houses are, although confided to local management and applied to uses which are in a sense local, though in another sense general." "That the property is public property, held and used for the purpose of the state which may in the absence of constitutional prohibition, make such use of it as it sees fit." We can not doubt the legislative authority to change these districts and provide for the disposal of their property and payment of their debts, as was done in this case."

Opinion of Mr. Justice Hooker in this case. 131 Michigan Reports pages 644-645 and 647.

To hold otherwise would make it well nigh impossible to suitably care for the needs of communities where small villages spring up by reason of railroad crossings or other cause, where heretofore the needs of the people were supplied by different school districts. It is a matter of common knowledge that when these villages spring up they outgrow their former needs and that it is necessary and to do away with former things and provide newer measures with which to provide their wants. It was clearly within the power of the Michigan Legislature to look into the local needs of the village of Jerome and by the Act in question furnish said village with a suitable and proper school district. It is easy to raise the cry of "confisca-

tion" and "unconstitutional" and such compliants are not uncommon from those who look upon any increased cost of education or increased educational facilities as un-necessary and unjust, but we submit this record discloses nothing tangible on which to found the claim either of confiscation or injustice.

The brief for Plaintiff in error filed in this case seeks to raise many points which to our mind have no place in this discussion and should be eliminated.

Our brother complains of the provisions of the act whereby six trustees are appointed and dwells at considerable length up in the unconstitutionality and evil of such provision.

See brief for Plaintiff in error, pages 34, et. seq.

Well, all that has been disposed of by the Michigan Supreme Court and judgment of ouster has been entered against such trustees as were so holding office at the time the decision of the case was made. It is idle and approaches puerility to drag that question into this discussion. If any wrong was done the relators by these provisions of the act in question it has all long since been cured and their right to elect according to law the trustees of the district who shall act for them and carry out their will as expressed at the meeting of said district has been as fully given them as it would by holding this act void by reason of the said provision having been made a part of the act. It is no longer a part of the act and this Court has no concern about it.

This complaint and its kindred contained in the last pages of brief of Plaintiff in error are all matters for the State Court and in no wise affect the right to corporate existence and call for no discussion here.

It will be well at all times to separate the matters controlled by constitution from those controlled by legislative enactment. If this is done many of the questions raised by our brother need no reply. We wish to call the attention of this Court to two cases cited and apparently relied upon as conclusive.

He says, "Almost on all fours with the case at bar is the case of State V. Haben 22 Wis. 660." Page 31 of brief.
We submit that where an act of the legislature sought to

divert a fund raised by tax for the express purpose of building a school house to an entirely different object—to give said fund to a State normal school—is hardly on all fours with the case at bar, and that a careful reading of the case cited does not bear out the contention of counsel. Again we wish to call attention to the case of

Pearson v. State 56 Ark., 148.

Cited and at some considerable length commented upon. We contend that if all the case is read it makes for, rather than against our view of the law.

Without further comment, we join with our Brother Graves in asking that the writ of error be dismissed for want of jurisdiction, and failing that, the judgment of the court below should be affirmed with costs.

FRED H. STONE,

Attorney for Defendants.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 21.

THE ATTORNEY-GENERAL OF THE STATE OF MICHIGAN EX REL L. E. KIES ET AL.,
Plaintiff in Error.
vs.
THOMAS J. LOWREY ET AL.,
Defendants in Error.

Office Supreme Court U. S.
FILED
OCT 19 1905
JAMES H. McKENNEY,
Clerk.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

HENRY B. GRAVES,
Attorney for Defendants in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1905.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 21.

THE ATTORNEY-GENERAL OF THE STATE OF MICHIGAN EX REL L. E. KIES ET AL.,
Plaintiff in Error.
vs.
THOMAS J. LOWREY ET AL.,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

We have filed a brief in this case in which we have in a few words outlined our argument on the questions involved. We now wish to discuss more at length the points we made in our original brief.

FIRST.

IS PLAINTIFF IN ERROR QUALIFIED TO SUE OUT A WRIT OF ERROR TO THIS COURT FROM THE SUPREME COURT OF MICHIGAN UNDER SECTION 709, U. S. REV. STATUTES?

The claim of plaintiff in error is that the statute in question,

A. Impaired the obligation of some contract.

B. Deprived the citizens and taxpayers of the omitted territory of their property without due process of law.

C. Violated the right of local self-government guaranteed to the citizens of the dismembered school-districts by the Constitution of the United States.

Assignments of Error, Rec., 64-65.

Plaintiff in error is the Attorney-General of the State of Michigan, who commenced the proceedings by information in the nature of a quo warranto on the relation of certain individuals. The proceedings were brought for the purpose of ousting respondents from certain offices, not because relators claim to be entitled to the offices, but because it is claimed no such offices exist, the statute creating them being unconstitutional. If relators appeared as claimants for the offices, then the proceedings though public in form being in the name of the state, would really be private. Such private proceedings are authorized in Michigan, the Statute of Anne, 9 Anne C., 20, being re-enacted in Michigan.

Sections 9966 *and* 9967, 3 *C. L.*, 1897.
Vrooman vs. Michie, 69 *Mich.*, 42.

But the proceedings in this case are confessedly public, the information stating that the Attorney-General "sues for and on behalf of the people of the State of Michigan." (Rec. 8, Ex. B.). Therefore the proceedings partake of the nature of the original prerogative writ of quo warranto, and the appearance of relators was unnecessary, although proper.

Attorney-General vs. James, 73 *Mich.*, 234.

It would therefore seem that it is the State of Michigan which is really the party plaintiff in the case.

Manifestly the Attorney-General has no individual interest in the case, and he is not qualified to sue out the writ of error.

Smith vs Indiana, 191 *U. S.*, 138.

In that case, it was held that a county auditor in Indiana, who was not personally interested, could not test the constitutionality of a law, as the official representative of the taxpayers of the county. In that case it was said on page 149:

> "We think the interest of an appellant in this court should be a personal and not an official interest, and that the defendant, having sought the advice

of the courts of his own state in his official capacity, should be content to abide by their decision."

The same thing was held about the county clerk of an Oklahoma county in

Caffrey vs. Oklahoma, 177 *U. S.,* 346.

So it might seem as thought the State of Michigan should sue out the writ, and not its official representative. But granting that the Attorney-General does represent and stand for the state and the people thereof, has the state any personal interest in the questions raised by the assignments of error?

The first claim is that the dismembered school-districts held their property under some sort of contract, which has been impaired by the act in question.

There is no claim in the record or brief that they held their property by grant from any third persons, and even if this were so, the state could not complain of a breach of the grant. The third persons only could complain in this court.

But counsel is evidently contending that the school-districts and the citizens thereof held their property under a contract with the state. This, of course, we deny and will discuss later. But granting that the dismembered school-districts did hold their property under a contract with the state, can the state or its representative, who is plaintiff in error here, complain in this court because it has broken its own contract by its own act of legislation? Manifestly not. Even in the state court, there is evident impropriety in the Attorney-General attacking in behalf of the state the constitutionality of an act of the legislature. He should only make such attack when moved by some one having a private interest, which is injured, and in such event, the proceeding is really private, though public in form. The duty of the Attorney-General is to defend the constitutionality of state laws, and not assail them.

Pound vs. Attorney-General, 119 *Mich.,* 528.

But whatever the practice may be in the state courts, in this court certainly the state through its Attorney-General cannot complain because by its own act it has impaired the obligation of a contract it made with some of its citizens.

Passing to the second claim of counsel, which is that the citizens and taxpayers of the dismembered school-districts were deprived of their property without due process of law. Here also the state cannot complain of its own action. For it is the citizens and taxpayers who were injured, and who must complain. In

Lampasas vs. Bell, 180 *U. S.*, 276,

this court said that the City of Lampasas could not complain because certain residents of contiguous territory were given no opportunity to be heard on the proposition to annex their territory to the city, which thing the city actually did do. This court said that the city had no proprietary right or interest in the territory and "it was put to no hazard of taxation without a hearing" and it could not "stand in judgment for those who had such interest or were put to such hazard."

We pass to the third claim that the act violates the right of local self-government guaranteed to the citizens of the dismembered school-districts by the Constitution of the United States. Although, of course, we deny any such right exists, it is plain that, if it does, the local communities, who are deprived of the right, must complain and not the state. The state has done them the wrong, and they, not the state, are directly injured.

But we presume counsel may contend that the relators are really the parties complaining in this suit, and not the state. The information does not say so, and under the authority of

Attorney-General vs. James, 73 *Mich.*, 234,

it is plain counsel is wrong.

But, even if it were otherwise, the information does not show relators were injured. The information does not show that relators have any property in the dismembered districts or pay any taxes there or vote there. It does not even show the residence of relators at all. (Rec., 8-9, Ex. B.) Neither is there any evidence or showing on any of these points anywhere in the record, until we reach the petition for the writ of error to this court (Rec., 2). There we find it stated for the first time that relators are resident taxpayers, property owners and voters in said old school-districts.

Now this comes too late. Suppose respondents wished to take issue on this point, how could it be done in this

court? If it were a proven or admitted fact in the court below, then this court would abide by the finding of fact.

Gleason vs. White, U. S. Sup. Opinion, May 29th, 1905.

The record must show conclusively that plaintiff in error raised a Federal question in the court below and his statement in his petition for the writ of error that he did raise such a question comes too late.

Leeper vs. Texas, 139 *U. S.,* 462.

Likewise the record must show conclusively that plaintiff in error was interested in the Federal questions which he raised in the court below in order to qualify him to ask this court by petition to review these questions.

But even if it were otherwise, plaintiff in error does not, even as late as in his petition for the writ of error, show that relators are interested in the Federal questions raised. They are said to be "resident taxpayers, property owners, and voters in said old school-districts" (Rec., 2). But in what part of the old school districts? If in the part omitted from the new district, and they have resided there long enough, then they are qualified. But if they now live in the new district, how are they hurt? How does it injure them to have all the property of the old districts turned over to the new district in which they live?

To sum up on this point:

The record shows that plaintiff in error has no interest in the Federal questions raised, if plaintiff in error is either the Attorney-General or the State. And it is probable that plaintiff in error stands for the State.

But if plaintiff in error represents the relators, the record does not show that relators have any interest in the Federal questions raised.

SECOND.

Before proceeding to a discussion on the merits of the particular claims of counsel for plaintiff in error, it will be well to obtain an accurate idea, if possible, of the nature of the dismembered school-districts.

School-districts in Michigan are *public* corporations, as distinguished from *private* corporations. They are so

called in the legislation creating them, which we have quoted at length on page 16 of our original brief, and again quote here.

> "Every school-district organized in pursuance of this chapter * * * shall be a body corporate, and shall possess the usual powers of a corporation for public purposes, by the name and style of 'school-district number ....,' * * * and in that name shall be capable of suing and being sued, of contracting and being contracted with, and of holding such real and personal estate as is authorized to be purchased by the provisions of law, and of selling the same." (Comp. Laws Mich., 1897, Vol. 2, Sec. 4652)

Whether they are strictly *municipal* corporations or only quasi-municipal corporations is a question upon which we do not agree with counsel for plaintiff in error. It is true that Article XV, Section 1 of the Constitution of Michigan says:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes."

But the Constitution of Michigan nowhere uses the terms "public corporations" and "private corporations," and it is obvious that the word "municipal" is here used in the broader sense of "public," in the manner remarked by Judge Dillon.

> *Dillon's Municipal Corporations, 4th Ed., Vol.* 1, *Sec.* 20.

The Constitution of Michigan nowhere defines school-districts or makes any compulsory provision for their creation. They are, therefore, purely creatures of the legislature. It is true that the Supreme Court of Michigan in the case of

> *School District vs. Gage,* 39 *Mich.,* 484,

held school-districts could not be garnished because they were municipal corporations. But here again the word "municipal" was obviously used interchangeably with the word "public", because no public corporation can be garnished, whether municipal or quasi-municipal. It is the public nature and not the municipal nature of the corporation, which makes it against the policy of the law that

the corporation should be required to act as a stakeholder in private quarrels.

It is also true that the Supreme Court of Michigan spoke of school-districts as municipal corporations in the case of

Belles vs. Burr, 76 *Mich.*, 1-11.

But the question in that case was whether women could vote at school elections or not, and this depended on the question whether the Constitution of Michigan had provided for the qualification of the electors at school elections. This court found that the Constitution had provided for the qualification of electors at the election of all officers named in the Constitution, but school-district officers are not therein named and the legislature consequently had full power to prescribe who should vote at such elections.

Again it is obvious that the question before the court did not require a definition of school-districts. Neither was the question before the court as to whether school-districts are strictly municipal or only quasi-municipal corporations. The word "municipal" was again used in the sense of "public."

But in the case at bar the question was squarely presented whether school-districts in Michigan are strictly municipal or only quasi-municipal corporations. The court holds that they are only qu[illegible]i-municipal corporations, and this opinion concerning a [illegible]higan institution by the court of last resort of that state must be of weight in this court.

Recurring again to the case of Belles vs. Burr, supra, we quote from the majority opinion on page 11, because there is well stated in a few words the legal position of school-districts in Michigan.

> "Viewing the question historically, it is apparent that for 50 years it has never been considered that the qualifications of voters at school-district meetings must be identical with those prescribed in the Constitution as qualifications of electors entitled to vote under that instrument. The authority granted by the Constitution to the legislature to establish a common or primary school system carried with it the authority to prescribe what officers should be chosen to conduct the affairs of the school-districts, to define their powers and duties, their term of office, and how and by whom they should be chosen.

> School-districts are regarded as municipal corporations. (School-District vs. Gage, 39 Mich., 484; Seeley vs. Board of Education, Id. 486). As such they preceded the Constitution (Stuart vs. School-district, 30 Mich., 69), and were recognized by that instrument (Const., 1835, Art. 10, §3; Const., 1850, Art. 13, §5). But no officer of the school-district is mentioned or recognized by that instrument. The reason is that the whole primary school system was confided to the Legislature, and it cannot be said that the officers of school-districts, chosen pursuant to the system adopted by the Legislature, are constitutional officers. The Constitution provided for no municipal subdivisions smaller than towns, except cities and villages, and it authorized the Legislature to incorporate these. (Const., 1850, Art. 15, §13)."

It is quite apparent from the foregoing that school-districts in Michigan are not an anomalous institution, differing from the institution of the same name in other states. They were part of the territorial government, preceding both state constitutions and the admission of the state to the Union. They are essentially the same thing as in all the older states. It is therefore of some interest and importance to ascertain the views of other state courts and other authorities upon the question whether school-districts are strictly municipal or only quasi-municipal corporations. Judge Dillon in the 4th Edition of his work on Municipal Corporations says on pages 41 and 42, Section 22:

"All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations. Thus an incorporated school-district, or county, as well as city, is a public corporation; but the school-district or county, properly speaking, is not, while the city is a municipal corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political or public corporations are not, in the proper use of language, municipal corporations."

Further on, in discussing the distinction between a municipal corporation and a quasi-municipal corporation, Judge Dillon says on page 44, Section 25:

> "Civil corporations are of different grades or classes, but in essence and nature they must all be regarded as public. The school-district or the road

district is usually invested by general enactments operating throughout the state with a corporate character, the better to perform within and for the locality its special function, which is indicated by its name. It is but an instrumentality of the state, and the state incorporates it that it may the more effectually discharge its appointed duty.

* * * * * * * *

Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence, and hence have been frequently termed quasi-corporations."

The author had previously approved on page 42, Section 23, the distinction made between municipal corporations and quasi-municipal corporations by the Ohio Supreme Court in the case of

Hamilton Co. vs. Mighels, 7 Ohio St., 109.

This distinction is in substance that municipal corporations proper are created mainly for the interest, advantage, and convenience of the locality and its people and are asked for or assented to by the people they embrace; whereas quasi-municipal corporations are superimposed by a sovereign and paramount authority and are local subdivisions of the state, created by the will of the state, without local solicitation, consent, or concurrent will, in furtherance of a scheme of public policy of the state at large.

In the Revised Edition of Beach on Public Corporations by John W. Smith, published in 1903, the same distinction is made and the same definition given. See pages 11 and 12, Sections 8 and 9.

Now enough has appeared in this case to show that public education in Michigan is a great state institution. As our associate counsel has shown in his brief, the system is a state system with a state officer at its head, and the state directly grants large sums of money each year for its support, besides acting as trustee of an immense fund provided by the bounty of the Federal Government from public lands in the state. And the local school-districts are creations purely and simply of the state superimposed on the local communities frequently against their wishes, and located oftentimes within the municipalities proper for the purpose of fulfilling the state scheme of education.

We have cited a number of cases in our original brief on page 16 in support of our contention that the opinion of the Supreme Court of Michigan in this case was right in denominating the dismembered school-districts quasi-municipal corporations. In addition to those there cited, we cite the following:

Harris vs. School-District, 8 *Foster*, 28 N. H., 58-61.
Rogers vs. People, 68 *Ill.*, 154.
Heller vs. Stremmel, 52 *Mo.*, 309.
School-District vs. Williams, 38 *Ark.*, 454.
Beach vs. Leahy, 11 *Kas.*, 23.

Perhaps Mr. Justice Brewer, now of this court, will recall the last case, where he examined the question at length, while sitting in the Supreme Court of Kansas, and reached the conclusion we are contending for.

We are very certain that the school-districts in question were properly called only quasi-municipal corporations.

Now the importance of this question lies in the recognized doctrine that all the property of merely quasi-municipal corporations is public property, the corporation being only the little finger of the state and having no private functions to perform and therefore no private property with which to perform them. We do not think we are too strong in this statement, but in any event all of the property of such corporations is, at least, *presumptively* public property.

It may possibly be argued that we are reasoning in a circle; that we are proving the corporation is only quasi-municipal by assuming it has no private property, and then we prove that its property is private by leaning on the premise we have established that the corporation is quasi-municipal. Not so. We show that the corporation is one of limited powers, thrust on the community with or without its consent, pursuant to a state scheme of education, and assisted by large state grants. This proves the corporation to be only quasi-municipal and then the conclusion follows that all the property is at least *presumptively* public property.

THIRD.

Having established, as we think, quite conclusively, that the dismembered school-districts were merely quasi-municipal corporations, we next consider the case upon the merits of each contention of counsel.

DID THE STATUTE IN QUESTION IMPAIR THE OBLIGATION OF ANY CONTRACT?

There is nothing in the record to indicate that the school-districts held any property by virtue of any contract with third persons.

The school-districts are public corporations, so defined by the legislation creating them, which we have before quoted. Being public corporations, their charters and right to exist are not the result of any contract with the state.

Dartmouth College vs. Woodward, 4 *Wheat*, 518 (*Dictum*).
Aspinwall vs. Commissioners, 22 *Howard*, 364.

And so far as the school-districts held any public property, they held it by virtue of no contract with the state.

We will review some of the cases in this court on this question.

East Hartford vs. Hartford Bridge Co., 10 How., 511, is the early leading case.

There the state granted the town of East Hartford the right to maintain a ferry over the Connecticut River, which was a valuable property right by reason of the tolls. But this grant was held not to be a contract between the state and the town, so as to prevent the state from annulling the grant at any time it saw fit.

In the case of Board of Commissioners vs. Lucas, 93 U. S., 108, the property held by the municipality was stock in a railroad paid for by taxation and the question under discussion was whether the state had the power to require the stock to be surrendered by the municipality and delivered to the taxpayers, pro rata according to the amount of taxes paid. Although this court did not find it necessary to de-

cide whether the stock was held by virtue of a contract with the state and therefore could not be diverted, Mr. Justice Field used the following language in the opinion:

> "But between the State and municipal corporations, such as cities, counties, and towns, the relation is different from that between the State and the individual. Municipal corporations are mere instrumentalities of the State, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn, at the pleasure of the legislature. Their tenure of property, derived from the State for specific public purposes, or obtained for such purposes through means which the State alone can authorize,—that is, taxation,—is so far subject to the control of the legislature that the property may be applied to other public uses of the municipality than those originally designated. This follows from the nature of such bodies, and the dependent character of their existence. But property, derived by them from other sources is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property. And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants. There are probably provisions in the constitutions of the several States which would prevent any marked diversion in that way; but whether a contract between the State and the municipality, within the protection of the Federal Constitution, is implied in such cases, that the property acquired shall not be diverted from the purposes of the municipality and appropriated to other uses, is a question we are not now called upon to determine."

In the case of Newton vs. Commissioners, 100 U. S., 548, certain citizens of Canfield, Ohio, had subscribed money pursuant to an act of the legislature locating the county seat at Canfield permanently on condition of such subscription. And yet this court held not only that this did not make a contract between the state and Canfield, but also that there was no contract between the state and the subscribing citizens.

In the case of Essex Public Road Board vs. Skinkle, 140 U. S., 334, the plaintiff in error was a quasi-municipal body charged with the duty of improving public roads and assessing the expense on adjoining real estate, and its property rights were the real estate purchased to perpetuate and enforce the lien of the assessments. It was decided that the property was not held by virtue of any contract with the state.

In the case of New Orleans vs. New Orleans Water Works Co., 142 U. S., 79, the City of New Orleans made a contract with the New Orleans Waterworks Company to pay for the water the city used by remitting taxes against the company. This contract was abrogated by subsequent legislation procured by the consent of the company. It was held that the city had no contract with the state, and the following language was used on page 91 of the opinion:

> "But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a mere agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the Water Works Company, than it would have had if such contract had been made directly with the State. The State, having authorized such contract, might revoke or modify it at its pleasure."

In the late case of Worcester vs. Street Railway Co., 196 U. S., 539, this court reviewed many of the authorities and again enunciated and applied the same doctrine. In this case, the City of Worcester had made a contract with the Street Railway Company, which required the latter to repair and pave certain streets. This contract the state abrogated with the consent of the Street Railway Company. This court held that, inasmuch as the duty of repairing and paving streets was a public duty, the contract with the Street Railway Company simply amounted to a method the city had secured of having its public duty performed by another, and this method, like the duty itself, the state could annul, just as the city itself could do, with the con-

sent of the Street Railway Company. The general doctrine was stated on page 551 in the following words:

> "Enough cases have been cited to show the nature of a municipal corporation as stated by this court. In general it may be conceded that it can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, "to constitutional protection." Property which is held by these corporations upon conditions or terms contained in a grant and for a special use, may not be diverted by the legislature. This is asserted in Commissioners, Etc., vs. Lucas, Treasurer, 93 U. S., 108, 115, and in Mount Hope Cemetery vs. Boston, 158 Massachusetts, 509, the Supreme Court of Massachusetts held that cities might have a private ownership of property which could not be wholly controlled by the state government."

Now the foregoing are all cases where the state has actually wiped out of existence public property of the municipalities, such as ferry tolls, tax assessments, free water, the right to require street paving and repairing, etc.

But there is a line of cases, where the state has apparently inflicted almost as much injustice, and yet has diverted no property from its intended use, although it has deprived the citizens who paid for the property by taxation of the benefits of the same. These cases are much like the case at bar and should rule it.

In Commissioners of Laramie Co. vs. Commissioners of Albany Co., 92 U. S., 307, the state dismembered Laramie County, and organized two new counties out of the major portion of the old county, giving the new counties the bulk of the wealth and taxable property of the old county and making no provision for an apportionment of the heavy indebtedness of the old county. This court held that the counties in question did not exist or hold their property or owe their debts by virtue of any contract with the state, and dismissed the complaint of the old county, using the following language on pages 312 and 313:

> "Such corporations are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, de-

riving even their existence from the legislature. Their officers are nothing more than local agents of the State; and their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated. (Russel vs. Reed, 27 Penn. St., 170).

Civil and geographical divisions of the State into counties, townships, and cities, said Thompson, C. J., had its origin in the necessities and convenience of the people; but this does not withdraw these municipal divisions from the supervision and control by the State in matters of internal government. Proof of that is found in the fact that the legislature often exercises the powers to exempt property liable to taxation, and in many other instances imposes taxes on what was before exempt, or increases the antecedent burdens in that behalf. It changes county sites, and orders new roads to be opened and new bridges to be built at the expense of the counties; and no one, it is supposed, disputes the exercise of such powers by the legislature. (Burns vs. Clarion County, 62 Penn. St., 425; People vs. Pinkney, 32 N. Y., 393; St. Louis vs. Russell, 9 Mo., 507).

Old towns may be divided, or a new town may be formed from parts of two or more existing towns; and the legislature if they see fit, may apportion the common property and the common burdens, even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation. (Bristol vs. New Chester, 3 N. H., 521).

In dividing towns, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, may extend or abridge their privileges, and may impose new liabilities. Towns, says Richardson, C. J., are public corporations, created for purposes purely public, empowered to hold property, and invested with many functions and faculties to enable them to answer the purposes of their creation."

And further on pages 314-315, the following language was used:

"Legislative acts of the kind operate differently under different circumstances. Instances may be given where the hardship is much the greatest to-

wards the new municipality, as where the great body of the property and improvements are left within the new boundaries of the old corporation. Other cases are well known where the hardship is much greater towards the old corporation, as where the newly-created subdivision embraces within its boundaries all the public buildings and most of the public improvements and the most valuable lands. Circumstances of the kind, with many others not mentioned, show beyond doubt that such changes in the subdivisions of a State often present matters for adjustment involving questions of great delicacy and difficulty.

Allusion was made to this subject by the Supreme Court of New Hampshire in the case to which reference has already been made (3 N. H., 534). Speaking of the power to divide towns, the court in that case say that the power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided is incident to the power to divide the territory, and is in its nature purely legislative. No general rule can be prescribed by which an equal and just decision in such cases can be made. Such a division, say the court in that case, must be founded upon the circumstances of each particular case; and in that view the court here entirely concurs. (Powers vs. Commissioners of Wood County, 8 Ohio St., 290; Shelby County vs. Railroad, 5 Bush., 228; Olney vs. Harvey, 50 Ill., 455).

Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulation, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim. (North Hemstead vs. Hemstead, 2 Wend., 134; Dil. on Mun. Corp., section 128; Wade vs. Richmond, 18 Gratt., 583; Higginbotham vs. Com., 25 Id., 633)."

In Mount Pleasant vs. Beckwith, 100 U. S., 514, this court again had the subject under consideration and reached the same result. The familiar doctrine is again enunciated on pages 525 and 526:

> "Alterations of the kind are often required to promote the public interests or the convenience and necessities of the inhabitants; and the public history shows that it has been the constant usage in the States to enlarge or diminish the power of towns, to divide their territory by set-off and annexation, and to make new towns whenever the legislature deems it just and proper that such a change should be made. Old towns may be divided and new ones incorporated out of parts of the territory of those previously organized; and in enacting such regulations the legislature may apportion the common property and the common burdens, and may, as between the parties in interest, settle all the terms and conditions of the division of their territory, or the alterations of the boundaries, as fixed by any prior law.
>
> State legislation may regulate the subject; but if the legislature omits to do so, the presumption, as between the parties, is that they did not consider that any regulation was necessary. Where none is made, in case of division the old corporation owns all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the act of separation was passed. Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the public property, except what falls within her boundaries, and to that the old corporation has no claim whatever. (Laramie County vs. Albany County, 92 U. S., 307; Bristol vs. New Chester, 3 N. H., 521)."

From these authorities in this court, it is not difficult to elucidate and state the correct doctrine. A public corporation is a mere arm of the state, sometimes in the case of real municipalities created at the request or by the consent of local communities, for the joint convenience of the state and the local communities; and sometimes, in the case of quasi-municipalities, created regardless of local consent, for the sole purpose of performing locally some state function. To enable the public corporation to perform its public duties, the state either directly grants it

property or indirectly does the same thing, by giving it the power of taxation. The property thus acquired is public property. Neither the corporation nor its public property exists by virtue of any contract with the state. The state may at any time without the consent of the corporation either terminate its existence or resume the grant of property or the right of taxation.

But it is possible for a public corporation to acquire in other ways property granted to it for particular purposes. This is quite common in the case of municipal corporations proper, but it is doubtful whether quasi-municipalities, like school-districts or road districts, ever hold any such property. (See Essex Public Road Board vs. Skinkle, supra). The acquisition of such property may happen in various ways, frequently from the bounty of public spirited citizens; and if the purposes are partially or wholly private in their nature and do not relate simply to duties which the municipality is performing for the state, then the property is *private* and not public, and such property cannot be diverted by the state from the intended purposes.

Whether such private property is held by the municipality under any contract with the state, is a question over which the authorities in this country are hopelessly in conflict. It is unnecessary to cite or discuss the numerous cases. We do not find that this court has ever decided the question.

It seems to us that there are none of the elements of a contract present, and in order to find a contract we must create a fiction. Fictions in the law are only created for beneficial purposes to meet emergencies. They are mere stop-gaps, and they often make an infinite amount of trouble. They are perpetually appearing as false links in our trains of reasoning, and upsetting our logical conclusions. They should never be invented when useless and they should be discarded when they have performed their functions. Fines and common recoveries have properly disappeared, and we see no reason for inventing the fiction of a contract between the state and its municipalities, in order to protect the private property of the latter from public attack. The 14th Amendment to the Constitution of the United States is ample protection, as Judge Dillon intimates in a note upon page 113 of the 4th Edition of his work on Municipal Corporations. See also

Mt. Hope Cemetery vs. Boston, 158 *Mass.*, 509.

In that case, the 14th Amendment protected a public corporation, the City of Boston, from an act of the legislature taking away a cemetery, which was private property, and bestowing it upon a private corporation.

Public corporations hold their *public* property for and under direction of the state. Public corporations hold their *private* property in trust for the people of the community; and although the state may destroy the trustee, it cannot destroy the trust. The state may *create* a new trustee and may within reasonable limits regulate and control the administration of the trust, but it can go no further. Such seems to be the conclusions reached by Judge Dillon, and the authority is great and the reasoning sound.

Dillon on Municipal Corporations, 4th Ed., pp. 117-118.

The reason why we are discussing this question is because, in one view of the case, this court may be called upon to decide whether the private property of a public corporation is protected under the theory of a contract with the state or by the direct provisions of the 14th Amendment. The Federal question arising under the 14th Amendment was not adverted to, considered, or decided by the Supreme Court of Michigan, whereas the Federal question under the contract clause was spoken of by two of the judges. Now, if this court should find that the dismembered school-districts did hold private property and the act in question deprived them of it, then it would be necessary to decide whether they held it or not by virtue of any contract with the state. We insist that, even in such an event, there was no contract and the wrong Federal question is raised.

But we insist also that there are three reasons which render a decision of this question unnecessary:

1st. There is nothing in the record to show that the dismembered school-districts had any private property. They probably held lands, schoolhouses, furniture, libraries, etc. (Rec., 7), but this is public property.

Rawson vs. Spencer, 113 *Mass.,* 40.

Counsel will undoubtedly gainsay this proposition and insist that the property mentioned is private property. In Michigan, there are cogent reasons for treating public school-houses, and their equipments as public property.

When we consider the requirements of the Constitution of the state, and the immense grants directly from the state in support of their schools, (all referred to and discussed in the brief of our fellow counsel, Mr. Stone), we think this court should respect the opinion of the highest court of the state on this point.

Besides this, the record does not disclose how the property in question was acquired. It may have been acquired under a grant from the state, directly reserving the right to resume the grant. The school-districts were restricted to holding only "such real and personal estate as is authorized to be purchased by the provisions of law." (Comp. Laws Mich., 1897, Vol. 2, Sec. 4652). The school-districts being mere quasi-municipalities, the presumption certainly is that all their property is public. We are not permitted to presume injustice or illegal conduct on the part of the legislature.

But the other reasons render a decision of this point unnecessary.

2nd. There is nothing to show that all the property was not geographically located in the new district and thus would become the property of the new district without any apportionment in the statute, under the rule laid down in Laramie Co. vs. Albany Co., and Mount Pleasant vs. Beckwith, supra. This would amount to a permissible regulation of the administration of the trust under these cases, even if the property were private.

3rd. There is nothing to show any unfairness in the apportionment actually made by the statute. The new district received all the property of the old districts, but it also was saddled with all the debts (Rec., 7), and the debts may have equalled the value of the property.

Among the multitude of cases bearing on the questions involved in this argument, it would be strange if authorities could not be found holding contrary views to those above given. Counsel cite only two cases, however, which are worthy of attention.

Town of Milwaukee vs. City of Milwaukee, 12 Wis., 93, certainly does not clash with the cases in this court. There the Town of Milwaukee bought forty acres of land which it held as *private* property and which lay within its political boundaries. The state changed the boundaries and placed the land within the political boundaries of the City of Milwaukee, and the latter for that reason claimed the

fee of the land. Owing to the private nature of the property, the court held this could not be done.

State vs. Haben, 22 Wis., 660, is a case where the legislature of Wisconsin ordered certain money then in the treasury of the City of Oshkosh and raised by taxation for the purpose of building a high school, to be diverted and used in buying the site for a state normal school. But the legislature had no power under state law to tax the City of Oshkosh for the purpose of buying the site for a state normal school, and therefore had no power to appropriate money already raised by taxation against the city for that purpose. It is true the court used some very broad language in deciding the case, which is quite different from the case at bar. But the foregoing is a sufficient reason for the result, which is obviously correct.

Our conclusion on the question under discussion is that the dismembered school-districts held their property under no contract with the state or with third persons; and even if they did, the record does not disclose any impairment of the obligation of this contract.

* * * * * * * * *

THIRD.

DID THE STATUTE DEPRIVE THE CITIZENS AND TAXPAYERS OF THE OMITTED TERRITORY OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW?

We again protest that this Federal question under the 14th Amendment was neither raised in the Supreme Court of Michigan nor there decided.

But we answer the question no, for the following reasons:

1st. The property was public property, not private property. It was held by the school-districts subject to the directions of the legislature of Michigan, as limited by the provisions of the State Constitution. The legislature by the statute in question directed the disposition of it and did not divert it from the purposes for which it was acquired.

2nd. There is nothing in the record to show that any citizen or taxpayer of the omitted territory ever contributed a cent towards the acquisition of the property.

3rd. There is nothing in the record to show that the apportionment made in the statute is unfair, because the relation between the debts of the districts and the value of their property nowhere appears.

* * * * * * * * *

FOURTH.

DID THE STATUTE VIOLATE THE RIGHT OF LOCAL SELF-GOVERNMENT GUARANTEED TO THE CITIZENS OF THE DISMEMBERED SCHOOL-DISTRICTS BY THE CONSTITUTION OF THE UNITED STATES?

Our answer to this question is as follows:

1st. The Constitution of the *United States* does not guarantee local self-government to Michigan school-districts. There is neither reason nor authority for the contention of counsel.

2nd. The Constitution of *Michigan* does guarantee local self-government to Michigan school-districts, and that right the Supreme Court of Michigan enforced in this case. But that right does not involve a Federal question.

We are totally unable to follow counsel in his argument that the Constitution of the United States protects local communities in their local government; and inasmuch as he cites no provisions of the Constitution and no authorities, we can do nothing more than deny the existence of the right he claims to exist.

HENRY B. GRAVES,
Attorney for Defendants in Error.

Supreme Court of the United States.

No. 21.—October Term, 1905.

The Attorney General of the State of Michigan Upon the Relation of L. E. Kies et al., Plaintiff in Error, vs. Thomas J. Lowrey, H. S. Walworth, C. H. Manzer et al.	In error to the Supreme Court of the State of Michigan.

[November 13, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

The constitution of the State of Michigan requires the legislature to establish and provide a system of public schools, whereby a school shall be kept open at least three months in each year in every school district in the State. In fulfillment of this requirement legislation was enacted from time to time providing for the formation of school districts. Under this legislation (1881) four school districts were organized in the townships of Somerset and Moscow, county of Hillsdale. In 1901 the legislature passed an act known as "Act Number 315 of the Local Acts of the State of Michigan for the Year 1901," entitled "An act to incorporate the public schools of the village of Jerome, Hillsdale County, Michigan; define the boundaries thereof, provide for the election of trustees and fix their powers and duties, and provide for the distribution of the territory of the disorganized districts." By this act one of the districts formed in the townships of Somerset and Moscow, in which the village of Jerome is situated, and portions of other districts, was set off and incorporated in one school district, to be known as "the public schools of the village of Jerome." The act appointed defendants in error trustees of the new district, to continue in office until their successors should be elected, as provided in the act. The act gave to the new district the property within its limits which had belonged to the districts from which it was created, and required the new district to assume and pay the debts and obligations of the old districts. The new district did not include all of the lands of the old districts.

On the 7th of October, 1901, an information was filed in the nature of a *quo warranto* by the attorney general of the State upon the relation of L. E. Kies, W. E. Alley, J. B. Strong and Stephen McCleary, charging defendants in error with usurping, intruding into and unlawfully claiming

to exercise "a false, fictitious and pretended public office, to wit, trustees and officers of the pretended school district known as 'The public schools of the village of Jerome,' and *ex officio* 'The board of school inspectors of the public schools of the village of Jerome,' to wit, at the county of Hillsdale aforesaid, in contempt of the people of the State of Michigan, and to their great damage and prejudice."

The Circuit Court rendered a judgment of ouster against defendants in error. The Supreme Court entered the following judgment: "The judgment of ouster should be affirmed as to such officers as now hold under the legislative appointment, if there be any thus holding. As to others, if any, it will be reversed."

The grounds of attack upon the validity of the act creating the new district in the Supreme Court of the State were as follows:

First. It deprives this school district or municipality of the right of local self-government, guaranteed to all municipalities by the Constitution.

Second. The title to the act indicates and the act itself embraces more than one object.

Third. The act is broader than the title; the body of the act embraces many objects not covered by the title.

Fourth. The act as passed impairs the obligation of contracts, within the meaning of the Constitution of the United States and the Constitution of the State of Michigan.

With the first three grounds we have no concern. They present strictly local questions. We are concerned with the fourth ground only in so far as it invokes the Constitution of the United States. The Supreme Court disposed of this ground as follows: "We have already shown that the obligation of contracts is not impaired. The districts did not hold this property under any contract with the State, but as a public agency." In other words, the non-existence of a contract was rested on the construction of the Constitution and laws of the State, and hence defendant in error contends that the decision of the court did not involve a Federal question. This, however, overlooks the power and duty of this court to determine for itself the existence or non-existence of a contract. Other grounds in support of the motion to dismiss are urged which, we think, are also untenable. The motion is therefore denied.

Plaintiff in error broadened in this court his objections to the act, based on the Constitution of the United States. He urges, besides, the contract clause of the Constitution, that provision of the Fourteenth Amendment which protects private property from deprivation without due process of law, and section 4, article IV, which provides "The United States shall guarantee to every State in the Union a republican form of government." But the grounds all depend ultimately upon the same arguments. If the legislature of the State has the power to create and

alter school districts and divide and apportion the property of such district no contract can arise, no property of a district can be said to be taken, and the action of the legislature is compatible with a republican form of government even if it be admitted that section 4, article IV, of the Constitution applies to the creation of, or the powers or rights of property of, the subordinate municipalities of a State. We may omit, therefore, that section and article from further consideration. The decision of the other grounds urged we may rest upon the opinion of the Supreme Court of the State and the case of *Lamarie County* v. *Albany County et al.*, (92 U. S. 307.) It is there said in many ways, with citation of many supporting cases, that the legislature of a State has absolute power to make and change subordinate municipalities. The following quotation meets exactly the contentions of plaintiff in error:

"Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not, and cannot be, any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests as understood by those who control the action of the legislature. Opposition is sometimes manifested, but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable." Many cases are cited. See also *Worcester & Worcester Street Railway Co.*, (196 U. S. 539.)

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.